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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1348

ROBERT WAYNE AUSTIN,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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OPINION BELOW

The opinion of the Supreme Court of Indiana is reported in —— Ind. ——, 319 N.E.2d 130. It is printed in Appendix A to this petition.

JURISDICTION

1. The jurisdiction of this Court is invoked to review a final decision of the highest Court of the State in which a decision could be had, on the ground that there was

drawn in question a right privilege and immunity claimed by the petitioner under the Constitution of the United States, in that the material evidence admitted against the petitioner, consisting of evidence of other similar alleged criminal offenses denied him fundamental fairness and due process of law.

2. The date of the judgment sought to be reviewed as well as the time of its entry, was November 27, 1974; the expiration of time for filing Petition for Writ of Certiorari in this Court of February 25, 1975 was enlarged to and including April 25, 1975 by order of this Court dated February 13, 1975.

3. No petition for rehearing was filed in the Supreme Court of Indiana.

4. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S. Code, § 1257 (3).

QUESTIONS PRESENTED

1. WHETHER DEFENDANT WAS DENIED DUE PROCESS AND FAIR TRIAL BECAUSE EVIDENCE OF OTHER SIMILAR ALLEGED CRIMINAL OFFENSES WAS ADMITTED AT HIS TRIAL.

2. WHETHER THERE WAS PERMISSIBLE EXERCISE OF JUDICIAL DISCRETION IN ADMITTING EVIDENCE OF OTHER SIMILAR ALLEGED CRIMINAL OFFENSES, OR DID THE USE OF SUCH EVIDENCE BY THE STATE RISE TO THE POSTURE OF DENIAL OF FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) The Fifth Amendment to the Constitution of the United States, reading as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, property, without due process of law; nor shall private property be taken for public use, without just compensation."

(2) The Sixth Amendment to the Constitution of the United States, reading as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

(3) The Fourteenth Amendment to the Constitution of the United States, reading as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(4) Indiana Code of 1971—I.C. 35-1-55-1, formerly Indiana Annotated Statutes (Burns 1956 Repl.) Section 10-2901, reads as follows:

> "Kidnaping—Whoever kidnaps, or forcibly or fraudulently carries off or decoys from any place within this state, or arrests or imprisons any person, with the intention of having such person carried away from any place within this state, unless it be in pursuance of the laws of this state or of the United States, is guilty of kidnaping, and, on conviction, shall be imprisoned in the state prison during life."

(5) Indiana Code of 1971—I.C. 35-14-4-3, formerly Indiana Annotated Statutes (Burns 1974 Suppl) Section 10-4201, reads as follows:

> "Rape—Penalty.—Whoever has carnal knowledge of a woman forcibly against her will, or of a female child under the age of sixteen (16) years; or whoever being over eighteen (18) years of age, has carnal knowledge of a woman, other than his wife, who is insane, idiotic or feeble-minded, he knowing of such condition; (,) is guilty of rape, and on conviction shall be imprisoned for a determinate period of not less than two (2) years nor more than twenty-one (21) years; Provided, That in cases where the female upon whom the crime is committed is a child under the age of twelve (12) years, the punishment shall be imprisonment for life. Upon the conviction of a person for the carnal knowledge of a woman forcibly against her will, sentence shall neither be witheld (withheld) by the court nor suspended by the court."

(6) Indiana Code of 1971—I.C. 35-1-89-1 formerly Indiana Annotated Statutes (Burns 1975 Suppl) Section 10-4221, reads as follows:

"Sodomy.—Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of eighteen (18) years to commit masturbation or self-pollution, shall be deemed guilty of sodomy, and, on conviction, shall be fined not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), to which may be added imprisonment in the state prison not less than two (2) years nor more than fourteen (14) years."

STATEMENT OF THE CASE

(1) The Facts Material to Consideration of the Questions presented.

Petitioner was charged with the crimes of sodomy, rape and kidnapping of Bonnie Diane May on November 8, 1972. He was found guilty in the Vigo County Circuit Court on all counts and sentenced to imprisonment upon such charges for respective terms of two (2) to fourteen (14) years, two (2) to twenty-one (21) years and life.

Petitioner appealed from the said sentences and judgement of conviction to the Supreme Court of Indiana which court affirmed the judgement of the trial court on November 27, 1974.

The first witness called by the State of Indiana in the trial of Robert Wayne Austin was Suzanne Little. Miss Little testified that she was walking on Fifth Street when she was approached by a man asking if she knew where George was. (Bill of Exceptions 562). She stated that she did not know where George lived and took off running. She testified that the person who approached her was the defendant Robert Wayne Austin. (Bill of Exceptions—570). The identification was made over objection on the grounds that the defendant was not charged with any

offense against a Suzanne Little and that his only charges were against Bonnie Diane May. (Bill of Exceptions 570) The objection was overruled. (Bill of Exceptions 570)

The next witness called by the state was Bonnie Diane May, the complaining witness in this cause, testified that she was on Ninth Street proceeding to a dormitory when a man approached her and grabbed her by the coat. (Bill of Exceptions 605). She testified further that the man took her across the street to a car and placed her inside it. (Bill of Exceptions 606). Miss May then testified that the man drove through town north toward Clinton and turned off onto a side road. (Bill of Exceptions 609). She then testified that the individual committed acts of oral sex upon her and had intercourse with her against her will. Bonnie Diane May identified the defendant as the man who committed these acts upon her. (Bill of Exceptions 617-618).

The next witness called by the State of Indiana was Melinda Sue Stanbaugh. The girl testified that in the early morning hours of November 8, 1972, she was returning to a dormitory when she was grabbed by a man and put into an automobile. She then stated that the man took her out of town and committed acts of oral sex upon her and had intercourse with her against her will. (Bill of Exceptions 720). Melinda Sue Stanbaugh, over the objection of defense counsel, identified the defendant as the man who committed these acts upon her. The defendant's attorney moved to strike the entire testimony of the witness on the grounds that the defendant was not charged in the affidavit with any acts upon this witness. This motion was overruled. (Bill of Exceptions 725).

The defendant's attorney at the close of the states case moved to strike all testimony of those witnesses other than

Bonnie Diane May who testified that they were approached or accosted by the defendant. (TR 897-898). This motion was denied. (TR 898).

Mr. James Michaels stated the defendant made the following statement:

> He stated that as close as he could remember, that approximately four to five years ago he was living with a girl friend and that he went home one evening and he explained that he could have very easily went home and went to bed with her without any problems and everything would have been a normal night, but he said this particular evening he got the urge to force her. So he went in and he grabbed her and he forced her. Ah — and he stated that he thinks that this is when this forcing satisfaction first started. (TR 893-894)

The defense objected on the grounds that this testimony should be disregarded because it was too remote to the issue at hand. (TR 894). The motion to strike that testimony was overruled.

(2) Raising of the Federal Questions

It appears from the opinion of the Indiana Supreme Court that there exists a question as to whether the federal questions here presented were actually considered and decided by said opinion. It is therefore relevant to determine how and when petitioner raised a federal question in the trial court and the court below.

Petitioner first raised the questions considered here, in the trial court by way of specific objection to admission of evidence of other crimes and to the discretion of the court in its rulings thereon.

The testimony of Suzanne Little indicated defendant approached her and frightened her near the location of the crime charged against the defendant. Defendant objected at (Bill of Exceptions, page 570—line 11) to any testimony of identification and at (Bill of Exceptions, page 578—line 20) to any introduction of photographic identification for the reason he was not charged with any crime against this witness; renewed his objections at (Bill of Exceptions, page 582—line 14) and made them continuous, moving to strike all such testimony at (Bill of Exceptions, page 583—line 8); at the close of trial defendant again moved all of her testimony on the same ground.

The testimony of Melinda Stanbaugh indicated defendant allegedly committed the crimes of kidnap, rape and sodomy against her on the day before the crime for which defendant was charged which commenced near the location of the principal crime.

Defendant objected at (Bill of Exceptions, page 677, line 21) to any testimony about other alleged similar crimes because "it was beyond the scope of the allegations charged in the affidavit" and made such objections continuous and renewed them at (Bill of Exceptions, page 679—line 25) Defendant further objected to photographic identification by this witness for the same reason.

Defendant further objected to admission of photographic identification (Bill of Exceptions, page 706—line 9) by said witness for reason there was no connection between testimony of the witness and what defendant is charged with. At (Bill of Exceptions, page 724—line 27) defendant moved to strike all testimony of this witness for the previous reasons given.

Defendant objected to the testimony of Mary Ann Robertson, a nurse, at (Bill of Exceptions, page 749, line

14) to any evidence relating to her physical condition or the circumstances surrounding another alleged offense involving Melinda Stanbaugh, as beyond the scope of the affidavit and designed only to prejudicially inflame the jury. (Bill of Exceptions, page 749—line 11 to Bill of Exceptions, page 750.)

Defendant objected to the testimony of witness Donald Tryon, a police officer and to evidence of any other alleged crime involving defendant Melinda Stanbaugh, for the reason defendant was not charged with said crime (Bill of Exceptions, page 785—line 20) and defendant repeated said objections to any statement made by defendant to police concerning Melinda Stanbaugh (Bill of Exceptions, page 794—line 14 to page 796—line 12.) Defendant objected to testimony of Donald Tryon in regard to evidence of similar crimes disclosed as part of a statement to police, for the reason defendant was not charged with such crimes; the state raised the justification for admission of such evidence on the basis such crimes were "other sex offenses" and the court ruled to admit all such statements relevant to other sex crimes into evidence without restriction (Bill of Exceptions, page 810—line 5) indicating that the "gate was wide open" relative to evidence of other sex crimes due to the previous admission of such evidence (Bill of Exceptions, page 810—line 6 to Bill of Exceptions page 811—line 8) Defendant further objected to testimony of Donald Tryon, that his investigation uncovered similar sex offenses committed on Melinda Stanbaugh similar to the crime for which defendant was charged. (Bill of Exeeptions, page 831—line 1 to Bill of Exceptions, page 831—line 13)

Defendant objected to the testimony of police officer Raymond Tryon relating to any conversations with defendant (Bill of Exceptions, page 848—line 9)

Defendant objected to the testimony of police officer James Michael, concerning a statement made by defendant about a previous act of "forcing a girl", which was not a crime for which defendant was on trial. (Bill of Exceptions, page 893—line 4 to Bill of Exceptions, page 894—line 11) Said objections were overruled.

That defendant filed his Motion to Correct Errors (Appendix C) as a prerequisite procedural step to appeal and raised the federal questions in claimed errors of law numbers 28, 29, 30, 33, 40, 41, 49, 50, 51, 55, 64 and 65 relative principally to error claimed by admission over objection of testimony of Melinda Stanbaugh and others concerning alleged criminal acts with which the defendant was not charged.

The defendant further raised the federal questions in the issues and arguments of his brief filed in the Supreme Court of Indiana (Appendix C) wherein petitioner alleged specifically at page 11 and 12 the claim that his federal constitutional rights of due process under the 5th and 14th Amendment to the United States Constitution, were violated by State action as a result of the admission of evidence of crimes other than that with which he was charged. Defendant specifically asserts therein at page 14 and 15, that admission of evidence by the trial court, of other crimes, not within the scope of the exceptions to the general exclusionary rule, such as evidence of motive, depravity, common scheme or similar areas of probative value, denies the defendant due process and in the language of *Lawrence v. State*, (1972)—Ind.—, 286 N.E.2d 830 cited therein "circumvents the appellant's right to a fair trial. Defendant argued in his brief at page 15 (Appendix A) "that in *Lawrence* the court ruled that *prior convictions*

could not come in" and in the petitioners case only evidence of *alleged* criminal acts was admitted over objection.

In its opinion below (Appendix A) the Indiana Supreme Court presented four issues of which two: namely, (1) the admissibility of prior sexual offenses of the defendant and (3) the admissibility of extra judicial statements of the defendant made to a police officer during his incarceration and admitted a prior sexual assault,—show clearly that the Indiana Supreme Court necessarily considered and decided the federal questions first raised by defendant in the trial court, in reaching its decision. At page 3 of its opinion, (Appendix A) the court stated that the exclusionary rule relating to admission of evidence of other crimes does not apply in sex cases, and citing *State v. Robbins,* (1943) 221 Ind. 125, 46 N.E.2d 691, it stated that admission of such evidence was *subject to the discretion of the trial court* for remoteness. (Emphasis added)

At page 4 of its opinion on the issue of admission into evidence of extra judicial statements made by the defendant wherein he admitted a prior sexual assault, the court said that *the judge has wide discretion* to exclude such evidence upon specific objection for remoteness citing *Garr v. State* (1967) 248 Ind. 295, 227 N.E.2d 171; and *Watts v. State* (1950) 229 Ind. 80, 104, 95 N.E. 2d 570. Clearly on both these issues, the court has held that admission and control over the evidence is within the broad discretion of the trial court. By implication the court necessarily holds that such discretion was properly exercised and that the constitutional claims of defendant to due process and fundamental fairness of trial were not abridged in any manner. Although the admissibility of evidence is a state procedural question, the court in further language spoke of permissible judicial discretion in admis-

sion of evidence of other crimes and necessarily decided and reached by implication the question whether exercise of judicial discretion by the trial court was within the permissible limits of due process and fairness of trial.

There exists no apparent independent or adequate state ground upon which the opinion of the State Court may rest. Therefore, jurisdiction under 28 U.S.C. § 1257 (3) is present.

ARGUMENT

I

WHETHER DEFENDANT WAS DENIED DUE PROCESS AND FAIR TRIAL BECAUSE EVIDENCE OF OTHER SIMILAR ALLEGED CRIMINAL OFFENSES WAS ADMITTED AT HIS TRIAL.

Petitioner claims the impairment of his right to fair trial and due process by admission of evidence of other criminal acts other than the one with which he is charged. Petitioner urges the basic standard enunciated by the court in *Lovely v. United States,* 169 F. 2d 386 (4th Cir. 1948) that a person on trial for a sexual offense should be afforded the same evidentiary safeguards against irrelevant prejudicial testimony as an individual on trial for any other felony. This position finds support in ***Underhill v. State,*** 185 Ind. 587, 114 N.E. 88 (1916) wherein the court ruled that evidence cannot be introduced if it tends to create prejudice against the defendant. However, the Indiana Court stated in ***Fehlmen v. State,*** 161 N.E. 8, 10, 199 Ind. 746 that absolute necessity for the admission of such evidence creates the basis for the exception to the general rule, that evidence of other crimes is not admissible unless charged upon the defendant. The exceptions to the general rule are best set out in ***Watts v. State,*** 229 Ind. 80, 95 N.E. 2d 570 (1950) which indicated evidence of separate and distinct crimes are admissible to show intent, motive, purpose identification or a common scheme or plan. Petitioner argues that all or at least some of the testimony offered against him does not come within these exceptions. Petitioner claims that the majority of these exceptions are

created to establish categories where certain probative facts could clearly be shown to be relevant. Evidence which therefore is relevant to identify defendant as the person who committed the crime is not to be excluded because it additionally proves him guilty of another independent crime. *Loveless v. State,* ——Ind. ——, 166 N.E. 2d 864. Similarly, with respect to the other exceptions the general holding is that if they are relevant for particular reasons they are not thereby to be excluded because the testimony incidentally proves other offenses. *Tresenriter v. State,* 224 Ind. 10, 64 N.E. 2d 295. Sex crimes are given a special mutual relevancy in terms of illicit conduct so that evidence of one is otherwise competent to show a disposition on the part of the defendant subject only to exclusion by the trial court for remoteness, *State v. Robbins,* 221 Ind. 125, 46 N.E. 2d 691.

Petitioner argues that the failure of the trial court, to limit the testimony of other alleged criminal offenses in a greater degree to the specific exception scope and purpose for which such exceptions were intended, or to otherwise require such evidence to be both unavailable and necessary as an element of proof, deny him due process and fundamental fairness. Petitioner recognizes that questions of admission of evidence involve state law and procedures and does not involve any federal constitutional issues. *Grundler v. State of North Carolina,* 283 F. 2d 798 (4th Cir. 1960). Petitioner, however, alleges that the overall cumulative effect of the evidence of other alleged criminal acts other than the one with which he was charged throughout the trial resulted in a denial of rights inherently created within the concept of due process of the 5th and 14th Amendments. Petitioner argues that certain standards of fairness are required by due process, which standards exist independently of and concurrent with

state evidentiary rules and procedural questions. *State v. Robbins,* 221 Ind. 125, 46 N.E. 2d 691 (1943) which was followed by the court below is supremely illustrative of the standard applied by the court below, that limitations on evidence of other criminal acts do not apply in cases of illicit sex and that no standard except judicial caprice was exhibited throughout the proceedings in the trial court. Due process requires a balance of probative value and the probability of major prejudice accompanying evidence of other criminal activities either by the exercise of judicial discretion or formal evidentiary limitations. The absence of both in the conduct of admission of evidence in this case denied petitioner due process.

II

WHETHER THERE WAS PERMISSIBLE EXERCISE OF JUDICIAL DISCRETION IN ADMITTING EVIDENCE OF OTHER SIMILAR ALLEGED CRIMINAL OFFENSES OR DID THE USE OF SUCH EVIDENCE BY THE STATE RISE TO THE POSTURE OF DENIAL OF FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW.

Petitioner claims the impairment of his rights of fairness of trial and due process by an impermissible exercise of judicial discretion by the state trial court in admitting evidence of other similar criminal offenses with which he is not charged *Durso v. Pate* 426 F2d 1083 (7th Cir. 1970). The abuse of discretion claimed consists not only in its prejudicial content, but in the method of presentation and the extensiveness with which such evidence was cumulatively and repetitiously allowed to be presented and admitted over objection. (Appendix B—Bill of Particulars). Petitioner contends that in realistic consideration of all

circumstances of the case, the probative value of such evidence is outweighed by its prejudicial effect and that such abuse of discretion rises to the posture of the denial of fundamental due process. *Durso v. Pate,* 426 F2d. 1083 (7th Cir. 1970).

Generally, evidence of prior criminal acts of an accused which are not charged in an indictment are inadmissible. *United States v. Fierson* 419 F.2d 1020 (7th Cir 1969). Such rule has been broadened to make evidence of other criminal activities clearly admissible if it is relevant to indicate motive or some other element of the crime charged unless minor probative value is outweighed by major prejudicial effect. *United States v. Fierson* 419 F.2d 1020 (7th Cir 1969).

The question of admissibility is in the first instance a matter addressed to the discretion of the trial court. *Glasser v. United States,* 315 U.S. 60, 62 S. Ct 457, 86 L. Ed. 680 (1942). The admissibility of evidence is a matter of state law and procedure not involving Federal constitutional issues. *Grundler v. State of North Carolina,* 283 F2d 798 (4th Cir. 1960). It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. *Grundler v. State of North Carolina,* 283 F2d 798 (4th Cir. 1960).

In each case, upon direct review, a procedural question is presented whether there was a permissible exercise of discretion in admitting evidence of other criminal activity. *Grunewald v. United States,* 353 U.S. 391, 420, 77 S. Ct. 963, 1 L.Ed2d 931 (1957). The issue requires a determination whether the probative value of the evidence for the purpose for which it was admitted, outweighs the prejudice of that evidence to the accused. *Grunewald v. United States,* 353 U.S. 391, 420, 77 S. Ct. 963, 1 L.Ed2d 931 (1957).

The evidence of other criminal activity in the case for the state by each of the witnesses provided some relevant probative value. (Appendix B) Bill of Exceptions. The common factor in each was identification and proximity to the scene of the crime charged. (Appendix B) and *Watts v. State* 229 Ind. 80, 95 NE2d 570 (1950). The general rule of admission of evidence of separate and distinct crimes in establishing the guilt of a defendant is that such evidence is inadmissible except where relevant to show (1) intent (2) motive (3) purpose (4) identification common scheme or plan. *Watts v. State,* 229 Ind 80, 95 NE2d 570 (1950) *U.S. v. Fierson* 419 F2d 1020, (7th Cir. 1969).

However the admission of a portion of such testimony for a specific purpose does not justify the law in *State v. Robbins* 221 Ind 125, 46 N.E. 2d 691 (1943) followed by the court below *Austin v. State,* — Ind — , 319 NE2d 130 (1947). That decision held that such limitation in *Watts, supra.* does not apply where the chief element of the offense is illicit intercourse between the sexes, and that such evidence of prior and subsequent acts is admissible subject to exclusion in the discretion of the trial court. *Austin v. State,* — Ind —, 319 NE2d 130 (1974). Under that rationale as was apparently followed by th trial court, in the instant case, evidence of all other criminal activities are admisible in a case involving a sexual offense and "the gate is wide open" Appendix B (Bill of Particulars p 608).

The principle enunciated in *Lovely v. United States,* 169 F2d 386 (4th Cir. 1948) that determines that an individual on trial for a sexual offense should be afforded the same evidentiary safeguards against irrelevant prejudicial testimony as an individual on trial for any other felony, is more clearly directed toward the goal by which

all admissibility of evidence should be judged—relevancy in terms of probative value.

Petitioner's objection to the testimony of Suzanne Little "that he frightened her" Appendix B (Bill of Exceptions, p 570) and his objection to the testimony of Melinda Stanbaugh (Appendix B Bill of Exceptions page 514) relating to the extensive detail of his alleged sexual crimes against her which was overruled, was made on the basis that he was not charged with any crime against her. Petitioner further objected and was similarly overruled as to admission into evidence of the repetative testimony of the police officers, Donald Tryon (Appendix B—Bill of Particulars page 585) and Raymond Tryon (Appendix B—Bill of Particulars page 648) which set forth explicit details of the other alleged sexual offenses in the guise of investigative results or statements taken from petitioner concerning such activity. Such testimony by said witnesses was essentially presented by the state in the same manner as if it were the principle charge. Petitioner argues that the cumulative effect of such prejudicial testimony impaired his right to a fair determination by the jury of his guilt or innocence. *Rucker v. Myers* 311 F2d 311 (3rd Cir. 1962). in *Durso v. Pate* 426 F2d 1083 (7th Cir. 1970) evidence of other crimes concerning drug traffic participated in by defendants and by other persons was admitted in a murder trial, but the evidence was held by the court to be "probative as showing motive and intent and was part and parcel of a continuing series of transactions related to a particular quantity of narcotics which led to and were the reason for (the) murder". No denial of due process was held in the use of such evidence. *Durso v. Pate* 426 F2d 1083 (7th Cir 1970) dictates a reversal on constitutional grounds only if petitioner was prejudiced by introduction of evidence of other offenses to such degree

that denys him fundemental fairness. Such denial was held to have occured in *Commonwealth ex rel. Lowry v. Meyers* 242 F. Suppl 477 (E.D. Pa. 1965) where evidence of prior convictions was admitted where necessary evidence on issue of degree of punishment in murder trial, where defendant's extensive criminal record included offenses similar to felony for which he was then being prosecuted. Such exercise of discretion was held to be prejudicial as denying defendant due process. Petitioner contends that where as in his case repetitive cumulative testimony of other criminal offenses for which he is not charged occurs, and the state continues to treat the presentation and detail of such testimony in a manner similar to the case in chief without justification in terms of relevancy, weighed against major prejudicial effect such denial of the rights recognized in *Lowry, supra.* has also occurred in the present case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ should be granted as the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

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OCTOBER TERM 1974

No. ———

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Petitioner,

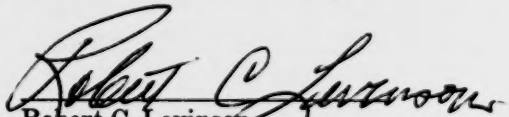
v.

STATE OF INDIANA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 1975, three copies of the Petition for Writ of Certiorari, were mailed, postage prepaid to Theodore L. Sendak, Esq., Attorney General of Indiana, 219 State House, Indianapolis, Indiana 46204, Counsel for Respondent. I further certify that all parties required to be served have been served.



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APPENDIXES A, B, C

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IN THE

SUPREME COURT of the UNITED STATES

October Term

No. _____

Robert Wayne Austin

v.

State of Indiana

Appendix A

Opinion of the Supreme Court of Indiana

ATTORNEY FOR APPELLANT	ATTORNEYS FOR APPELLEE
Robert Howard Brown Rm. 11 - 28 South 5th Street Terre Haute, Indiana	Theodore L. Sendak Attorney General of Indiana Henry O. Sitler Deputy Attorney General 219 State House Indianapolis, Indiana

IN THE

SUPREME COURT OF INDIANA



ROBERT WAYNE AUSTIN, Appellant	)	
v.	)	No. 1173 S 225
STATE OF INDIANA, Appellee	)	

APPEAL FROM THE VIGO CIRCUIT COURT

The Honorable C. Joseph Anderson, Judge

PRENTICE, J.

Defendant (Appellant) was charged with the crimes of Sodomy, Rape and Kidnapping, all arising out of the abduction and abuses of the prosecuting witness by the defendant on November 8, 1972. He was found guilty on all counts and sentenced to imprisonment upon such charges respectively for terms of two (2) to fourteen (14) years, two (2) to twenty-one (21) years and life. His appeal presents four issues:

I. The admissibility of evidence of prior sexual offenses of the defendant.

II. The admissibility of testimony that the defendant had approached another woman shortly prior to the abduction of the prosecuting witness.

III. The admissibility of extra-judicial statements of the defendant made to a police officer during his incarceration and admitting a prior sexual assault.

IV. The denial of the defendant's motion for mistrial following a reference to a polygraph test by one of the State's witnesses.

* * * * * * * * * * *

The prosecuting witness was a college student. She lived on campus. In the early night hours, she left her dormitory to go to another building on campus. While crossing a public street, she was approached by the defendant who said he wanted to talk to her. He forced her into his automobile and drove to a secluded spot and there forced her to submit to sexual intercourse, fellatio and cunnilingus. The sufficiency of the evidence is not in issue.

ISSUE I. A State's witness, another woman student at the college, testified that in the early morning hours of the same day as the abduction of the prosecuting witness, the defendant forced her into his automobile, drove to a secluded area and forced her to submit to sexual intercourse and oral sex. Defendant objected to this testimony and moved to have it stricken, which objection and motion were overruled.

The general rule in Indiana for the admission of evidence of separate, independent and distinct crimes in establishing the guilt of a defendant is that such evidence is

inadmissible except where relevant to show: (1) intent, (2) motive, (3) purpose, (4) identification, (5) common scheme or plan. Watts v. State (1950), 229 Ind. 80, 95 N.E. 2d 570, and cases there cited.

It has been held, however, that the above rule does not apply where the chief element of the offense is illicit intercourse between the sexes, and that such evidence of prior and subsequent acts is admissible subject to exclusion in the discretion of the trial court for remoteness. State v. Robbins (1943), 221 Ind. 125, 46 N.E. 2d 691.

The Robbins' decision was not followed in Meeks v. State (1968), 249 Ind. 659, 234 N.E. 2d 629 and Judge Lewis writing for a unanimous Court and relying principally upon Lovely v. United States (1948), Cir. Ct. of Appeals 4th Cir., 169 F. 2d 386, determined that an individual on trial for a sexual offense should be afforded the same evidentiary safeguards against irrelevant prejudicial testimony as an individual on trial for any other felony. This Court subsequently declined to follow the Meeks decision in Miller v. State (1971), 256 Ind. 296, 268 N.E. 2d 299, wherein the court on a charge of rape by force, permitted a witness to testify that the defendant had raped her by force thirty-five days prior to the act charged. This Court distinguished Meeks as having been involved only with the issue of consent. Sodomy was not an issue. The writer of this opinion dissented therein and would, in the case at bar, exclude the evidence, but the majority has voted to follow the Miller decision.

ISSUE II. Another woman student at the college testified, over the defendant's objection, that she was approached by the defendant, approximately one-half hour prior to the

time the prosecuting witness was abducted and in the same general area, and that the defendant on that occasion asked her if she knew where George lived. Although the defendant was not charged with any offense against this witness, her testimony was relevant in that it placed the defendant in the area at the approximate time the abduction occurred. Any fact which tends legitimately to connect the accused with the commission of the crime is admissible. Elliott v. State (1972), ___ Ind. ___, 279 N.E. 2d 207, 209; Pullins v. State (1970), 253 Ind. 644, 647, 256 N.E. 2d 553; Thomas v. State (1968), 251 Ind. 76, 80, 238 N.E. 2d 20; Foreman v. State (1938), 214 Ind. 79, 84, 14 N.E. 2d 546. See also, 29 Am. Jur. 2d, Evidence § 251; 22A C.J.S., Criminal Law §§ 606 and 610.

ISSUE III. Over the defendant's objection that it related to an event too remote to the issue, a police officer was permitted to testify that while the defendant was in his custody, the defendant voluntarily related to him that five years earlier he yielded to an urge to force sexual intercourse upon the woman with whom he was living and who would have readily consented. He related that he thought that this was when the urge to force intercourse first started with him. The evidence was relevant as reflective of the defendant's criminal intent. In this regard, we think the remoteness of the first instance of forcible intercourse was immaterial, because the admission of the defendant clearly indicated that the urge for forcible intercourse continued to the present time. Upon a specific objection for "remoteness," however, the trial judge has wide discretion; and the degree of remote-

ness goes to the weight and not to the admissibility of the evidence. Garr v. State (1967), 248 Ind. 295, 297, 227 N.E. 2d 171; Watts v. State (1950), 229 Ind. 80, 104, 95 N.E. 2d 570; Booher v. State (1926), 198 Ind. 315, 321, 153 N.E. 497.

ISSUE IV. During the direct examination of Police Officer Tryon by the prosecutor, the witness' attention was directed to November 11th and he was asked:

> "And would you tell the jury where you went with the defendant and who went with you?"

The witness replied:

> "At seven o'clock A.M., November 11, 1972, the chief of Detectives, Frank Hoffman, Detective Michaels, and myself, and Indiana State University Officer, Chris Lester accompanied Robert Wayne Austin to Putnamville, Indiana, the location of the Indiana State Police Post, where a polygraph - - - - -."

At the mention of the word "polygraph," defense counsel moved for a mistrial. The motion was denied, but the jury was instructed to disregard the witness' last statement and to give it no consideration when considering the rest of his testimony. Interrogation concerning November the 11th was not resumed.

It is the defendant's contention that the mere mention of the word "polygraph" was so prejudicial as to constitute an "evidentiary harpoon," speculating that the jury would thereby conclude that the defendant had undergone and failed a polygraph examination upon the issue of the crime charged.

The granting of a motion for mistrial rests largely in the discretion of the trial judge. Bonds v. State (1972), ___ Ind. ___, 280 N.E. 2d 313; White v. State (1971), 257 Ind. 64, 272 N.E. 2d 312.

If the defendant underwent a polygraph test, such fact should not have been disclosed to the jury — directly or indirectly, but we do not draw the harmful conclusion that the defendant does. The mention of the word "polygraph" was probably erroneous — but harmless. Certainly it did not rise to the level compelling a mistrial within the guidelines set forth in White v. State (supra). "Voluntary testimony of witnesses frequently cannot be controlled by counsel during questioning. However, even if the testimony of the witness was prejudicial to the appellant the action of the court in admonishing the jury to disregard that testimony, ordering it stricken from the record and ordering the jury not to consider the same, cured the defect." McPhearson v. State (1966), 247 Ind. 579, 583, 219 N.E. 2d 907.

We find no reversible error, and the judgment of the trial court is affirmed.

ARTERBURN, C.J. and GIVAN and HUNTER, JJ. concur.
DeBRULER, J. concurs in result.

CERTIFICATION

1173 S 225

Robert Wayne Austin
Vs.
State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original Indiana Supreme Court Opinion, filed November 27, 1974, as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 12th day of February, 1975.

Billie R. McCullough

BILLIE R. McCULLOUGH, CLERK
INDIANA SUPREME COURT

IN THE

SUPREME COURT of the UNITED STATES

October Term 1974

No. _____

Robert Wayne Austin,

Petitioner

vs

State of Indiana,

Respondent.

Appendix B

Bill of Exceptions

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Appendix B - Bill of Exceptions

Containing record wherein Federal question was properly raised and relevant portions of testimony concerning other alleged criminal offenses.

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FILED

CIRCUIT COURT VIGO COUNTY

DEC 1 1973

Leland Lawson
CLERK

STATE OF INDIANA)
) SS:
COUNTY OF VIGO)

IN THE CIRCUIT COURT OF VIGO COUNTY

STATE OF INDIANA

VS. NO. C-CR-72-170
C-CR-72-173
C-CR-73-72

ROBERT WAYNE AUSTIN

BILL OF EXCEPTIONS
CONTAINING THE EVIDENCE

BE IT REMEMBERED that on the 6th day of March, 1973, of the First Quarter of the 1973 Term of the Circuit Court of Vigo County, Indiana, Honorable C. Joseph Anderson, Judge of the said Circuit Court of Vigo County, presiding, the following proceedings were had in the above-captioned cause.

The cause being at issue, the same came on for trial by jury, Ralph Berry and Robert Wright, appearing as counsel for the State, and Robert H. Brown, appearing as counsel for the Defendant.

AND BE IT FURTHER REMEMBERED that before the trial was began, for the purpose of facilitating and expediting the trial of said cause, said Judge required to be present Betty J. Allen, Official Reporter of said Court to record and monitor on the Edison Voicewriter all of the evidence given in said cause, including questions and answers, documentary evidence, all offers to prove, all objections and motions of counsel, and all rulings of the Court with respect to the admission and rejection of evidence.

AND BE IT FURTHERED REMEMBERED that said official reporter was present and recorded and monitored on the Edison Voicewriter, all of the evidence given in said cause, including questions and answers, documentary evidence, all offers to prove, all objections and motions of counsel, and all rulings of the Court with respect to the admission and rejection of evidence thereto.

AND, the defendant, Robert Wayne Austin, having requested said reporter to furnish him with a complete transcript of all the evidence given, a typewritten transcript of the same was made by said reporter, and the same appears in the following words and figures, to-wit:

THE STATE OF INDIANA, TO MAINTAIN THE ISSUES ON ITS BEHALF, INTRODUCED THE FOLLOWING EVIDENCE:

COURT: There's been a motion for separation of witnesses by Mr. Brown. There's been a motion for separation of witnesses and the Court has granted that motion all those persons who are going to be witnesses, a witness, in this trial must leave the Court room. Must not listen to any proceedings in Court room. They must not discuss testimony with anyone other than attorneys involved in this case. Anybody here going to be a witness? O.K. Call your first witness.

MR. BERRY: Suzanne Little.

SUZANNE LITTLE, a witness for the State of Indiana, and having been

CERTIFICATION

1173 S 225

Robert Wayne Austin
vs.
State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original Bill of Exceptions, pages 557, 558 as contained in the Record of Proceedings filed on Feb. 15, 1974 as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 23rd day of April, 1975.

Billie R. McCullough

BILLIE R. McCULLOUGH, CLERK
INDIANA SUPREME COURT

first duly sworn, testified as follows, the examination being conducted by Ralph Berry, Prosecuting Attorney.

DIRECT EXAMINATION OF SUZANNE LITTLE

Questions by Mr. Berry.

Q. Would you state your name to the Jury, please?

A. Suzanne Little.

Q. And what is your age, Suzanne?

A. I'm twenty-three.

Q. And where do you reside?

A. 711 Chestnut, right now.

Q. And where are you from?

A. Huntington, Indiana.

Q. And where is Huntington, Indiana?

A. It's about 20 miles south of Fort Wayne.

Q. And how large of a place is Huntington?

A. It's about.a...has a population of about 33,000 people.

Q. What year are you in school?

A. I'm a senior. I'm starting my professional semester.

Q. And that's at Indiana State?

A. Yes.

Q. And are you single or are you married?

A. I'm single.

Q. And are you getting married soon?

A. Yes, in June.

Q. In June, and where does your fiancee live?

A. He lives in Livonia, which is about 10 miles from Salem,Indiana.

Q. He doesn't go to school here?

A. No, he does not.

Q. Do you date on the campus?

A. No, I do not.

Q. What does your family consist of, Suzanne?

A. I have two other brothers, two other sisters, and then my mom and dad.

Q. Now directing your attention to the evening of November 8th, 1972, approximately 9:00 o'clock P.M., where were you?

A. I was at the Home Ec Building on the campus.

Q. And where is the Home Ec Building on campus?

A. It's located on 6th Street--uh--just south of Chestnut. It's on the corner of Chestnut and 6th.

Q. That's on the southwest corner of 6th and Chestnut?

A. Yes.

Q. There at the intersection. Is that right?

A. Uh-huh....That's correct.

Q. And what time did you leave there, Suzanne?

A. Around 9:15.

Q. And would you describe to the Jury what route that you took when you left the building, the Home Ec Building?

A. I came out of the back entrance of the Home Ec Building.

Q. And that's located on what street?

A. It's on Chestnut. The Home Ec Building is here, with Chestnut running this way, 6th this way, and there's a parking lot right directly in back of the Home Ec Building. And there's an entrance and exit out of the back, so I came out of the back, walked across the parking lot, and I was headed north on Fifth Street.

quite similar in appearance.

COURT: Overruled. Get the Jury, Mr. Bailiff.

(JURY RETURNED)

BROWN: And as I recall, the question was only as to whether or not she could identify not asking her to identify, only if she could identify.

Q. The question was could you identify this?

A. Yes, sir. I can.

Q. And would you identify that person?

BROWN: An objection at this time for the reason stated and for the further reason that this defendant is charged with the three affidavits--uh--involvi a girl by the name of Bonnie Diane Haj and not the one named Suzanne Little.

COURT: Overruled.

BROWN: Beyond that---

COURT: Overruled. You may ask the question.

A. It's the gentleman sitting to my left in the blue shirt, and navy blue sports coat.

BERRY: Let the record show that she---She pointed out the defendant.

COURT: Let the record so note.

Q. Do you know what make and model car this was, this person you identified was driving?

A. Yes,sir. I do. It was a 1963 Chevrolet. It was a two-door. It

fender, right here and he blocked....

Q. Why don't you just mark over it then?

A. And it blocked the sidewalk.

Q. Mark with a longer X....

A. O.K.

Q. So you can see it better.

A. O.K.

Q. Now on State's Exhibit Number Three--uh--would you point out--uh--well you point out to the Jury where the lights are located in this area?

A. There's one by the back corner of the wall that goes around Jones Hall. There's one over by the small parking area that's right besides Jones. There's one at each corner of the parking lot of the Health Center. There's also one that is across the street.

Q. There's one directly across the street?

A. Yes...the intersections are very well lighted right up in that area

BERRY: At this time, Your Honor, I'd like to exhibit State's Exhibit's Number One, Two, and Three to the Jury.

BROWN: There's be an objection to that, because the --uh--photographs, the Exhibits as are in a different condition than they were when they were offered and admitt without objection on the part of the defendant, and--uh--for the additiona reason that--uh--in the questioning o the Prosecuter prior to the marking b

this witness of the Exhibits--uh--he was talking about where he was, and so forth, and--uh--the support of that objection would like to call again to the Court's attention that the defendant is charged with something on May the 8t involving a young lady by the name of May, and not by the name of Little.

COURT: Overruled.

(JURY SHOWN EXHIBITS NUMBER 1, 2, AND 3.)

COURT: All right, proceed Mr. Prosecutor.

Q. And how far away is your dorm, the dorm where you live, the dorm where you were going--uh--from the place where the defendant pulled his car across the drive-way, across the sidewalk and blocked your way?

A. It's about a block and a half.

Q. And you ran?

A. Yes, sir. I did.

Q. Did you report this right away?

A. No, sir. I didn't.

Q. And why didn't you report it?

A. Because I thought that the man that I had come in contact with was just drunk, and I didn't think anything about it, just him being drunk.

Q. And this was on Wednesday evening?

A. Yes,sir.

Q. And were you present on campus on Thursday?

identification of the man that I had come in contact with.

Q. And who did you identify?

A. Identify...I...I...

BROWN: Same objection.

COURT: Overruled. You may answer.

A. I identified the gentleman seated to my left in the navy blue sports coat and light blue shirt again.

Q. This report that Chris read to you, whose report was it?

A. It was the report that he had taken from me the night before, and that was the only one that I was given.

Q. And if...a...what time would you say that it was approximately that the defendant stopped you there--ah--at the alleyway just north of Jones Hall?

BROWN: Same objection as before, he used the word defendant.

BERRY: She's identified him now.

BROWN: I know that. I have to keep...well, may I automatic objection to any reference to the defendant in connection with anything that a...she says might have happened, again for the reason he's not charged with that?

COURT: Overruled.

BROWN: May it be shown as a continuing objection, Your Honor?

COURT: Let it be shown that, that is a continuing objection.

WITNESS: Pardon me, could you repeat the question please?

(Reporter repeats the question)

A. 9:15.

Q. And that was on Wednesday, November the 8th, 1972?

A. Yes,sir. It was.

BERRY: That's all.

BROWN: I have a question. Ah---I think at this time, Your Honor, the defendant moves to strike the entire testimony of this witness for the same reason that I based the objection as to her testifying the first place?

COURT: Overruled.

CROSS EXAMINATION OF SUZANNE LITTLE

Questions by Robert H. Brown

Q. I take it then, Miss Little, you looked at four pictures and four pictures only, that--a--that Mr. Lester uncovered for you?

A. Yes,sir.

Q. And--a--what points of similarity, if any, were there between the, amongst the four pictures?

A. Um---a couple of them had--ah--the men had fairly rough facial features and this was about the only similarity that I could find --uh--the fourth, the one that I described to you, of the young man who had rather pleasing facial features and quite a large head of hair, was the only one that really, I don't believe, really matched with any of the three that were viewed. I mean of the four that wer

CERTIFICATION

1173 S 225

Robert Wayne Austin

vs.

State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original testimony of Suzanne Little, pages 559,560,570, 578,579,582,583 as contained in the Record of Proceedings filed on February 15, 1974 as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 23rd day of April, 1975.

Billie R. McCullough

BILLIE R. McCULLOUGH, CLERK
INDIANA SUPREME COURT

COURT: Thank you.

(RECESS)

(TRIAL RESUMES)

MELINDA STANBAUGH, a witness for the State of Indiana, and having been first duly sowrn, testified as follows, the examination being conducted by Mr. Ralph Berry, Prosecutor of Vigo County.

DIRECT EXAMINATION OF MELINDA SUE STANBAUGH

Questions by Mr. Berry.

COURT: Have a seat right there. Better fix the microphone, Bob.

Q. Would you state your name to the Jury, please?

A. Melinda Sue Stanbaugh.

Q. And where do you live?

A. Dillsboro, Indiana.

BROWN: I'm sorry, I can't hear you?

A. Dillsboro, Indiana.

Q. And where is Dillsboro, Indiana?

A. It's in southeastern Indiana, it's about thirty-six miles from Cincinnati, Ohio.

Q. And how large is Dillsboro?

A. Oh---I think it has a population of about nine hundred people.

Q. And---how old are you, Melinda?

A. Eighteen years old.

Q. And how old were you on November the 8th, 1972?

COURT: I couldn't hear that, Mr. Prosecutor?

Q. How old were you on November the 8th, 1972?

A. I was eighteen.

Q. And what does your family consist of?
A. Oh---my parents and--ah-- an older brother and two younger sisters.
Q. And when did you enroll in---at I.S.U?
A. Ah--I came to school--ah--June 11th, that's right after I graduated from high school.
Q. And what are you majoring in, Melinda?
A. Special Education.
Q. And on November the 8th, 1972, where did you live?
A. Uh---in Burford Hall, Room 528.
Q. And what other buildings are in that area across the street from Burford Hall?
A. Uh---Directly across the street from Burford is the Administration Building, and next to that, Dreiser Hall, and then there's two other Dorms in the complex and those are Pickrell and Erickson.
Q. Ah--Burford Hall, then, is on North Sixth Street?
A. Yes.
Q. Ah--Directly across from the Administration Building?
A. Yes.
Q. And--ah--on the evening of November the 7th, the night of November the 7th, 1972, did you have the occasion to go to Jones Hall?

BROWN: I think--ah--we'll object to the question anything that--ah-- happened on anytime, any day, other than November 8th, 1972, would be....

COURT: For the same reasons, Mr. Brown?

BROWN: Yes,sir. It's beyond the scope of the allegations contained in this

affidavit.

COURT: Overruled.

BROWN: Would the Court note a continuing objection to each question and I'm assuming it would be with the same ruling.

COURT: The Court will--ah--record will so note.

A. Uh--I went to Jones Hall to visit some girl friends to study.

Q. And what time did you go to Jones Hall?

A. It was in the evening, I think, it was around eight o'clock.

Q. And where is Jones Hall on campus?

A. It's on North Street, North Sixth Street, also, and it's one, the last Dorm before Lincoln.

Q. Ah--north, then is part of---part of that Dorm on...also on North Fifth Street?

A. Yes.

Q. What students, are there boys or girls, or are their mixed floors in that Dorm in Jones Hall?

A. No, Jones is supposed to be a all-freshman girl Dorm.

BROWN: The--ah--I think I moved the microphone a little bit, I think it's perhaps too close.

COURT: Why, Mr. Brown?

BROWN: I seem to be getting a feed-back from where I am. It's difficult...

COURT: (Inaudible) If you move it, the Jury

Q. And how long were you in Jones Hall on the evening of November the 7th and the morning of November the 8th, 1972?
A. Well, I left Jones at about one o'clock.
Q. An---And then where were you going when you left Jones?
A. I was going back to my own Dorm.
Q. And were you by yourself or was someone with you?
A. I was by myself.
Q. And what was the weather?
A. It was...it wasn't too bad out, it was kind of warm, but it was sprinkling, it wasn't raining hard, it was just drizzling, a light...
Q. And when you left Jones Hall to go back to Burford Hall, what route did you take?
A. Um--I went back the same way that I came to Jones.
Q. Let's see, you left Jones Hall, over to Sixth Street, then south on Sixth Street?
A. Yes.
Q. Where were you--ah---on the morning of November the 8th, 1972, when you first noticed anything unusual?
A. Um---I was walking down Sixth, and I just crossed Chestnut, and I was on the other side of the street, and I saw a car going by, and...
Q. What direction was that car going?
A. North.

BROWN: And at this time, Your Honor, the defendant would like to have an objection for the same reasons that of the continuing one, for anything that

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happened on the eighth prior to about eight o'clock that night.

COURT: Same ruling.

Q. And this car was going north at that time, first?

A. Yes.

Q. And where did you say you were?

A. I was on the south side of Chestnut Street, right across the street.

Q. Just across the street? And did you see the car again?

A. (Inaudible) the car came back and was going south and it must have turned around somewhere, because it came back the same way that I was walking.

Q. What brought your attention to the car as it was going north?

A. Because there wasn't any cars at all out, and the fact that the guy was staring at me as I walked down the street.

Q. And what were you wearing?

A. Uh---a pair of slacks, a blouse and a smock.

Q. And you say the car apparently turned around and came back, then in a southerly direction, is that correct?

A. Yes.

Q. And what happened then?

A. Um---then the guy stopped the car in the street, well slightly in front of me, and he got out and told me that he wanted to talk to me.

Q. And where were you at that time--ah--when he stopped you?

A. Uh--In front of Erickson Hall.

Q. Where did you say you were at that time?

Q. Now would you take State's Exhibit Number 21 and mark on it where you were when you first saw--ah--this car--ah--going slowly in a northerly direction and watching you, and then mark again, mark with an X, (Pause) and then mark again with two X's, where you were when the car came up beside you and stopped ----by Erickson Hall. And that is in distance about a block?

A. That might not be absolutely correct.

Q. Ah--I'll hand you State's Exhibit 22 and ask you if you'll mark on that picture with an X where you were--ah--when the car pulled up beside you at the curb?

BERRY: At this time, Your Honor, I'd like to have the permission to exhibit to the Jury State's Exhibit Number 21 and 22?

BROWN: No objection.

COURT: Let the record show that they are exhibited to the Jury---without objection.

(EXHIBITS' NUMBER 21 AND 22 SHOWN TO THE JURY)

Q. Were you in front of Erickson Hall when the car pulled into the curb or what did he do?

A. The car didn't pull over it, just stopped in the road.

Q. Stopped in the road?

A. Yes.

Q. And what did the driver do?

A. Ah---the driver got out of the car and came over to the sidewalk and--um-- well, grabbed a hold of my arm and told me that he wanted

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to talk to me.

Q. And is he...what was his position...ah...with you in reference to Burford Hall?

A. I was facing towards Burford and he was facing me?

Q. And how was...he between you and Burford Hall?

A. Yes.

Q. And he said he wanted to talk to you?

A. Yes.

Q. And then...and...what happened then?

A. Um--I said that I didn't want to talk to him, that I was on my way home to the farm, and he kept insisting that he wanted to talk to me, and I told him a couple of times I didn't want to talk to him and he grabbed me by the shoulders and said that he wanted to talk to me, and if I didn't talk to him that...um...or get in the car with him to talk to him, that he would put me in the car and I said no, and he grabbed me around the neck from in back of me and put me into the car on the passenger's side.

Q. Ah--And what portion of your body did he have...did he have a hold of when he got you from the back?

A. Well, he'd been holding on to my shoulders and I knocked his arm away, and--an--he had a hold of my shoulders and turned me around, and just had me by the neck with his arm.

Q. Ah--Was he behind you and had---and had his arm around your neck?

A. Yes.

Q. And how did you get into the car with him?

A. Um--While he kept his arm around my neck all of the time and

just put me into the car, and I...

Q. What did you do then?

A. Then he got into the car on the same side, on the passenger's side and crawled over the top of me, and put the car in gear and started it to drive away.

Q. Ah---just putting his arm around your---your throat have any effect upon you?

A. Well, it scared me, and---ah---it kinda took my breath away. It was like, you know, I couldn't breath very well.

Q. And after he got you into the car, what did he do?

A. Um---he drove the car to the street that runs east and west, by Harford, and turned right there, and went to 3rd Street, and turned right again, and drove towards Clinton on 63, and stopped the car at a gravel road.

Q. Ah---Did you---ah---you went over to 3rd Street first?

A. Yes.

Q. Then you went north on 3rd Street?

A. Uh-huh.

Q. Did you come to any stop signs while you were on 3rd Street?

A. I don't really remember any---stops at all, but there may have been some, and if there were, like if there was a slight stop or anything, like he would always, you know, kinda put his arm down, to make sure that I sat still or whatever purpose.

Q. Ah---And he proceed north on 41 and then out on State Road 63?

A. Yes.

Q. And where did he go after he got on State Road 63?

A. Um---there's a gravel road that goes to the right off of 63, and

he went down that road and it ends in a dead end, and parked the car there.

Q. Did you know...notice anything--sh--as you...from the time you left, strike that. Did you notice anything concerning buildings or any other objects from the time you left State Road 63 till you came to the dead end?

A. Um---there were a few houses on the gravel road, about three I'd say, and on the left side of the road, there was a pony that was outside the fence and I saw that.

Q. I'll hand you State's Exhibit Number 24 and ask you to tell the Jury what it is?

A. It's a picture of the pony that I saw that night?

Q. And---and the road--sh--is the road that you were on that night off of 63?

A. Yes.

Q. And State Road 63 is there with the...to the top of the picture. Is that correct?

A. Yes.

Q. In other words, that's looking in a southerly direction?

A. Yes.

Q. And I'll hand you what's been marked as State's Exhibit Number 23, and ask you to tell the Jury what it is?

A. Um---This is the place where he parked the car, it's the dead end or the end of the road.

Q. And is the camera pointed...at the time that picture was taken, was the camera pointed in the direction in which you were parked?

A. You mean, was the car facing the same way as the camera?

Q: Yes.

A: Yes.

BERRY: At this time, Your Honor, I'd like to offer into evidence State's Exhibit Number 23 and 24.

BROWN: Preliminary questions?

COURT: You may.

BROWN: Was a girl by the name of Bonnie Diane Ray with you at any time, about matters that you just testified about?

WITNESS: With me?

BROWN: Yes, ma'am.

WITNESS: I never saw Bonnie before, until just this past week.

BROWN: All right. Then we'll object to the introduction of the State's Exhibits Number 23 and Number 24, for the reason that, the all three of the affidavits we're trying here today, Judge, allege criminal offenses involving a person by the name of Bonnie Diane Ray, and has no bearing, has nothing to do with--ah--anything other than that, so for that reason there objectable.

BERRY: Judge, those are sexual offenses with unusual sex acts, and the law of the

State of Indiana is that we can introduce prior sex offenses of this sort, when the acts are unusual to show, ah..

COURT: Mr. Brown, ---um---

BROWN: The question is, what is an offense?

WRIGHT: Your Honor, this is the same objection that he's been making all along and he tendered objection...

COURT: I don't under.... It's a different objection, Mr. Brown?

BROWN: This is a different objection, for different reasons, and this is to the introduction of exhibits and the continuing objection is for questioning. I want to protect the record on this case the Judge overruled.

COURT: Is it the same objection then? For the same reasons?

BROWN: Yes, sir.

COURT: Overruled.

BROWN: I was a little more specific, but the same basic objection.

BERRY: At this time, Your Honor, I'd like to exhibit to the Jury, State's Exhibit Number 23 and 24.

COURT: All right. Over the objection of the defendant, said Exhibits--ah...

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...Mr. Brown, any objection to the displaying to the Jury?

BROWN: Yes, sir.

COURT: And what's--------?

BERRY: 23 and 24.

COURT: 23 and 24 are offered and admitted into evidence over the objection of the attorney for the defendant and displayed to the Jury over his objection.

STATE'S EXHIBITS NUMBER TWENTY-THREE AND TWENTY-FOUR ARE IN THE WORDS AND FIGURES, TO-WIT:

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COURT: Proceed.

Q. Did you have any conversation from the time, from the time you left Burford Hall until the time you arrived at this dead end road, where you were parked?

BROWN: Notice the object continuing from now on out, Judge.

COURT: Let the record show that this is a continuing objection to her testimony.

A. Um---we talked some, but not a great deal, just about what my name was, and why he said that he said---wanted to talk to me, but that he hadn't said anything, and he was drink---drinking a can of beer, and he didn't say very much at all, just I asked him what his name was, and he just said John---D.---John Doe, and some other name, and that's all, just about---the extent of all that was said.

Q. And John DeVzenzio, DeVzenzio?

A. Yes.

Q. Ah--did he talk any about his...the fact that he was drinking?

BROWN: At this time, Your Honor, he's leading the witness for the soditional reason--ah--objection for an additional reason here.

COURT: I'll sustain it.

Q. What---what else did he talk about?

A. He didn't really talk about anything else until after we parked the car.

Q. O.K. And then, and then did you have any conversation with him after he parked the car?

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can tell, but that means she is not positive that she has seen them before. So unless she is positive she has seen them before then the question when did she get them, would be assuming something into evidence that's not there.

Q. Did you see them before?

A. Um---Yes, I saw them in this Court Room, and I---to the best of my knowledge, these are the same ones I saw in Mr. Wright's office.

Q. All right. And...

BROWN: Same objection.

COURT: Overruled.

Q. And would you select for the Jury the picture or the person that had you...picked you up beside Burford Hall and took you north on 63 and parked you at the end of the dead-end road?

BERRY: At this time I'll let the record show that she picked State's Exhibit Number 30.

Q. Is that a true and accurate representation of the way that individual looked on that particular night?

A. You mean, regarding his hair and everything?

Q. The way he looked?

A. Um---Yes.

COURT: Have you offered them, Mr. Berry?

BERRY: At this time, I'd like to offer into evidence, Your Honor, State's Exhibit's 25 through 30.

BROWN: Ah--As to--ah--what was there, six of them...

BERRY: Yeah.

BROWN: As to all six of these exhibits, the defense will object to their introduction on the basis of the Wade Rule which we were.....

COURT: Overruled.

BROWN: And --ah--for the additional, as to the additional reason as to Number 30, as theretofore stated, there's been no indication of any connection between what this witness is testifying about and what the defendant is charged.

COURT: Overruled.

BERRY: Let the record show that State's Exhibit Number 30 is admitted into evidence.

COURT: You have any objection it being displayed to the Jury, Mr. Brown, or the same objection?

BROWN: The same objection.

COURT: Overruled.

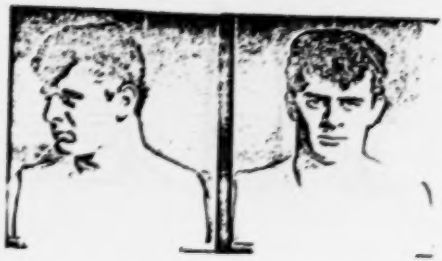
STATE'S EXHIBITS NUMBER TWENTY-FIVE, TWENTY-SIX, TWENTY-SEVEN, TWENTY-EIGHT, TWENTY-NINE AND THIRTY ARE IN THE FOLLOWING WORDS AND FIGURES, TO-WIT:

STATE'S EXHIBIT NUMBER TWENTY-SEVEN



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STATE'S EXHIBIT NUMBER TWENTY-EIGHT



(STATE'S EXHIBITS NUMBERED 25, 26, 27, 28, 29, and 30 SHOWN TO THE JURY)

COURT: Proceed.

Q. Is the person in the Court Room --an--that you selected from that group of pictures?

A. Yes.

Q. Would you point him out to the Jury, please?

BROWN: Same objection.

COURT: Overruled.

A. Um---right there. (Indicates)

BERRY: Would you let the record show that the witness indicated the defendant?

COURT: It will so note.

Q. An---Is that the same person that picked you up in front of Burford Hall?

A. In front of Erickson, yes.

Q. Pardon, Erickson, in front of Erickson Hall?

A. Yes.

Q. An---and took you up North on 63, and drove off on a country road?

A. Yes.

Q. When you arrived there at--an--at, at the end of that dead end road, did you have any conversation with the defendant there at that time?

A. Yes.

Q. And what conversation did you have with him?

A. Um--an--I asked him why he was doing, why he was doing this and he told me that he had been drinking, and that he'd taken some drugs

and that he was messed up, and he hadn't had any sleep. And I asked him if he didn't have a girl friend, and why he had to go pick up other girls, and he said he had had a girl friend but she dropped him, and that tonight that he just felt like being a mean son-of-a-bitch and raping someone.

Q. Ah--What did he try and do then, if anything?

A. Um---He tried to kiss me.

Q. And what did you do?

A. Um---I refused to kiss him.

Q. And in what manner---how did you refuse to kiss him?

A. Well, I just turned my head so that he couldn't kiss me.

Q. And what---what happened then?

A. Um---Then he tried to kiss me and I wouldn't kiss him. So he told me that he thought I had a pretty face and a nice body, and that he'd hate to mess them up. And he threatened to hit me and he choked me.

Q. Did he---did he actually choke you then?

A. Yes.

Q. And would you tell the Jury in what manner he choked you?

A. Um---He put both hands around my neck and applied pressure to the front of my throat.

Q. Did...what was the effect to his applying pressure to your throat?

A. Um---That it cut off my wind so that I couldn't breath.

Q. Ah---And what did he do then?

A. Um---he--ah--he was choking me and then he unbuttoned and took off my smock.

Q. And I believe you testified before that you had on a smock--ah--

some of the men on the Jury might not know what a smock is, would you describe it to us?

A. Um---It's a top that buttons down the front, and well, it's patterned after what women wear when they're pregnant, and just has like little sleeves that cover over a blouse.

Q. Ah--Was he still choking you at the time he was taking off your smock?

A. Yes.

Q. And would you describe to the Jury in what manner he did this?

A. Um---He was unbuttoning my smock with one hand and choking me with the other.

Q. And where were you in the car at that time?

A. Over next to the door.

Q. Did he take the smock off then?

A. Yes.

Q. All right, and then what did he do?

A. Um---Then he took off his--ah--sweatshirt and took off the rest of my clothes.

Q. The rest of your clothes? And would you describe to the Jury now he took your clothes off?

A. I had a blouse that zipped in the back and a bra, and he took those both over my head without unzipping or unhooking them, and then my pants were just gathered at the top and he just took those off.

Q. What kind of pants did you---did you have on?

A. They were slacks that just have elastic gathering around the waist of them.

Q. And he just pulled those off?

A. Yes.
Q. And you had on panty-hose?
A. Uh-Huh.
Q. All right. And did he take those off?
A. Yes.
Q. And you had panties?
A. Uh-Huh.
Q. And he took those off?
A. Yes.
Q. Ah---When did he take his clothes off?
A. Um---He took his sweatshirt off before he took the rest of my clothes off, and then all he had on was a pair of pants. A pair of levi's, and he took those off.
Q. What kind of clothes did he---was he wearing at that time?
A. Um---A sweatshirt, it was dark, it was brown, and tan levi slacks.
Q. And what kind of shoes did he wear?
A. They were white, and they had buckles on the sides of them.
Q. I'll hand you what's been marked as State's Exhibit Number 18, and ask you if these shoes are the same shoes, the same type of shoes he had on that evening?

BROWN: How what is this, I'd like the question repeated so I know what it is, whether it's the same shoes or the same type of shoes, you said both.

BERRY: The same type.

BROWN: The same type. All right, no objection

A. Yes.

Q. They the same coloring?
A. Yes.
Q. Ah---The same sort of buckles of the size?
A. Yes.
Q. O.K. After he took his clothes off and your clothes off, what did he do then?
A. Um---He tried to kiss my breast, but I wouldn't ---I wouldn't hold still long enough for him to do it.
Q. How did he kiss your breast?
A. Just, well, there was just like, you know, if a baby was sucking on its mother, that's how I, what I compare it with.
Q. And what did he do then, he---he sucked on your breast and did what?
A. Um---And I pushed him away, and--um--then he--um--got down on the floor and used his mouth on me.
Q. And what portion of your body did he use his mouth on?
A. Um--My--ah--my privates, I don't---well---
Q. Did he use his mouth on any other portion of your body?
A. ---An---
Q. Other than your breasts and your privates?
A. He bite my leg and my shoulder.
Q. Ah---And how long did he continue to use his mouth on your privates?
A. I'd estimate it to be about 30 minutes.
Q. And what did you do during this time?
A. I kicked him and I pushed him with my hands, tried to push him away.

Q. And what happened then?

A. That's when he got mad and he bite my leg.

Q. And did he have any conversation with you while he was there on the floor doing this sort of thing with you?

A. Um---He asked me if I liked it, and I said no. And I asked him, you know, why he had to do that, and he said that he enjoyed it and that it excited him.

Q. And were you moving about or were you still during this period of time?

A. Well, I was moving.

Q. And how many times did you kick him, if you really did kick him, how many times did you kick him?

A. I don't know how, exactly how many times, I just know that I did.

Q. Ah---You know how many times that he choked you?

A. I'd say maybe five or six.

Q. Times?

A. Yes.

Q. How he'd occasionally choke you, did he do it in the same manner?

A. Yes.

Q. Was any of the times he choked you, were some of the times more severe than other times?

A. Yes.

Q. Ah---And do you recall which time was the more severe?

A. Um---The last time that he choked me, he choked me harder than the previous times.

Q. Ah---What was the effect of choking on that occasion?

A. Um---Before I hadn't been really that frightened, and I, then I was really scared, and I just didn't know what to do.
Q. After he got through then of using his mouth on your privates, what did---what did he do then?
A. He got up and tried to kiss me again, and laid me down in the seat and tried to have intercourse with me, but he couldn't.
Q. And for what, he could not, for what reason?
A. Um---Because he didn't have an erection, just...
Q. O.K. And what did he do then?
A. Um---Then he told me that I have to help him out, because he couldn't, couldn't do it, and told me to use my mouth or my hand on him, and so I used my hand.
Q. And for how long did you use your hand?
A. I don't really know how long it was.
Q. Ah---Did this solve his problem?
A. Um---No.
Q. What---what did he do then?
A. Ah---after I did that, he tried to have intercourse with me again, but he couldn't, and so he got up and told me to use my mouth.
Q. And ---what did he say then, other than, did he say anything other than for you to use your mouth?
A. He asked, he asked me if I would rather that he did it in my mouth or inside me. And I said in my mouth, and--ah--.
Q. Were you on birth control pills?
A. No.
Q. All right. And what happened then?
A. I was using my mouth and he kept telling me to do it harder, but

I couldn't do it any harder, and so he told me that he was going to have a climax, and that---that wasn't good enough, and so he laid me down, and well, had intercourse, made love.

Q. And prior to the time--ah--that he actually had intercourse, between the time that--ah--he forced you to use your mouth on him, and--ah--the time you had intercourse, did he do anything else during that period of time?

A. Um---um--That's when he bit my shoulder.

Q. Ah--Doing, did he do anything--ah--with his hands or fingers during that time?

A. Um---He--ah--he tried to get inside me but he couldn't, because of the same problem that he had earlier, and he told me that it was my fault, because I wasn't moist enough, and so he used his fingers to, well supposed to, he said to make me moist and while he was doing that he used--um--he inserted one of his fingers into my rectum.

Q. So he put his fingers into your vagina and into your rectum both? Is that correct?

A. Yes.

Q. And it was after that then he had intercourse?

A. Yes.

Q. And did he climax?

A. Yes.

Q. And did you cry any throughout this time you were in the car?

A. I didn't really cry noticeably, when I was first with him I had tears running down my cheeks, but I never really cried out loud.

Q. Ah---What was his behavior after intercourse?

vcc

A. Well, after everything was all over, and, well, I asked if I could get dressed and he said, sure, go ahead, get dressed and he was very nice to me and talked and joked around, he was just a completely different person.

Q. And after you got your clothes back on, what happened then?

A. Um---We sat and he talked to me for a few minutes and then backed the car up the road and turned around in the wide place in the road, and then we start to go back to---towards town.

Q. And did you talk to him on the way back?

A. Um---Yes.

Q. And what conversation did you have with him on the way back?

A. On the way back we talked about, he asked me about things that I liked to do, and I told him, and he told me that he thought I was nice---girl. But then I said, do you think I should report this, and he said, No, and he stopped the car and talked to me for a few minutes.

Q. Ah---What did he say to you at that time?

A. He said that he thought that I was an understanding girl, then he didn't think it would be wise to report it to the police, just to forget about it.

Q. And then he drove you on back to the Dorm?

A. Yes.

Q. And did you have any conversation with him there at the Dorm?

A. At the Dorm he just told me that he was sorry that we'd met on such circumstances and that he'd like to see me again, and not to be surprised if he called me on Thursday night.

Q. On Thursday night?

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A. Yes.
Q. And this was on Wednesday morning....
A. Yes.
Q. That this took place? And what time did you get back to the Dorm?
A. It was about four in the morning.
Q. And how did you get back into the Dorm?
A. I got to the Dorm and got out of the car and walked up to the door and the night hostess let me into the Dorm.
Q. And what did you do when she let you into the Dorm?
A. I asked her to borrow a dime, and I bought a pack of cigarettes and I went up to my room and was going to change my clothes to go to bed, but when I took my clothes off, I saw the bites and the scratches, and I got really upset.
Q. And what did you do? Were you crying?
A. Yes.
Q. And what did you do then?
A. So then I went back downstairs and asked if I could borrow another dime. And I called David Jones, he's the guy that lives with my brother, and I asked him if he would come over, cause I wanted to talk to him. And then Valarie saw me crying.
Q. Who is Valarie?
A. She's the night hostess.
Q. And in that particular Dorm--ah--you have to be in by twelve o'clock, or you ---let in by the night hostess. Is that correct?
A. Yes. It's like that in all girl Dorms.
Q. And, so you told her you would--oh, you were crying and then she asked you what happened?

A. And I told her what happened, and she called the R.A. on duty, and they called the Security Police.

Q. And where were you taken then?

A. Um---I talked to the Security Police at the Dorm and they took me to the infirmary, the Health Center at school.

Q. And did they give you any medication there?

A. Um---while I was there the nurse looked at my bites and gave me a nerve pill and put me to bed.

Q. And---how long were you in bed there at that time?

A. I got there, I think, about five o'clock and at seven, they woke me and took me to the hospital.

Q. And what port----, what hospital were you taken to?

A. Union.

Q. And what part of Union hospital?

A. They took me to the emergency----rooms.

Q. And how long were you in the emergency rooms?

A. I don't really know how long I was there, it was until they admitted me into a room, I think it was about two hours and a half or three hours.

Q. And did anyone, any physician or surgeon see you there at the hospital?

A. Um---Doctor Rourke examined me.

Q. And did he do anything else other than examine you?

A. After examining me he--ah--he talked with my parents and they agreed that I should have a D and C, so there wouldn't be any chance of pregnancy.

Q. And you did have a D and C there in Union hospital?

wcc

A. Yes.
Q. What bruises and marks did you have on you?
A. Um---I had some slight bruises, they weren't probably noticeable, and I had--ah--.
Q. Where were they?
A. Just on my arms and on my throat, and then I had a bruise on my leg from the bite and I had teeth marks on my back from a bite.
Q. Were your breasts sore?
A. No, not really.
Q. How long were you in the hospital?
A. Um---I stayed there until late afternoon or early evening, and then my parents---my parents came up that day and I left with them.
Q. So that was on Wednesday during the daytime you left with your parents?
A. Yes.
Q. And where did you go?
A. Um---I went to my brother's house and then I went to the Dorm to get me some things, and then I went home.
Q. Back to Jonesboro?
A. Yes.

MR. BERRY: You may cross exam.

MR. BROWN: No questions.

COURT: All right, you're excused.

(WITNESS EXCUSED)

BROWN: And at this time the defense wishes to strike the entire testimony for

reasons given heretofore.

COURT: All right. Motion Denied.

(COURT ADMONISHED THE JURY AND COURT IS ADJOURNED FOR THE DAY)

BE IT further remembered, that on the 7th day of March, 1973, First Quarter of the 1973 Term of the Circuit Court of Vigo County, Indiana, the Honorable C. Joseph Anderson, Judge of the said Court presiding, the following proceedings were had herein:

JOHN BERRY BRIGGS, a witness of the State of Indiana, and having been first duly sworn, testified as follows, the examination being conducted by Ralph Berry, Prosecuting Attorney of Vigo County, Indiana.

DIRECT EXAMINATION OF JOHN BERRY BRIGGS

Questions by Mr. Berry.

Q. Would you state your name to the Jury, please?

A. John Berry Briggs.

Q. And what is your occupation?

A. I'm a graduate student in English Literature at Indiana State University.

Q. And where do you live?

A. 816 Hendricks Hall, on the ISU campus.

Q. And do you have any degrees?

A. I'm sorry, I didn't understand that.

Q. What degree do you have?

A. I have a B.A. degree.

Q. And when did you graduate?

A. Ah---1966, from the University of Wisconsin.

Q. And how long have you been here on the campus?

vcc

CERTIFICATION

1173 S225

Robert Wayne Austin
V.
State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original testimony of Melinda Sue Stanbaugh, pages 675-677,679, 680,685-691,694,705,706,709710,713-725 as contained in the Record of Proceedings filed on Feb. 15, 1974 as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 23rd day of April, 1975.

Billie R. McCullough
BILLIE R. McCULLOUGH, CLERK
INDIANA SUPREME COURT

A. Correct.

Q. OK. After taking her to the Health Center, did you do anything else as far as investigating this particular--------?

A. Ah---I believe I called the State Police on some information I had at that time.

Q. OK, this was on a description of a car, something of this nature?

A. That's right.

Q. OK, and --ah--who handled the investigation for the University after the morning of November the 8th?

A. Ah---Mr. Tryon and Mr. Westra, I believe.

Q. OK. They are detectives in your particular department?

A. That's correct.

Q. And so after the early morning hours of November the 8th, 1972, you did not participate in any further investigation?

A. Not at all.

WRIGHT: I've nothing further.

BROWN: No questions.

COURT: Thank you, Officer.

(WITNESS EXCUSED)

MARY ANN ROBERTSON, a witness for the State of Indiana, and having been first duly sworn, testified as follows, the examination being conducted by Prosecuting Attorney Ralph Berry.

DIRECT EXAMINATION OF MARY ANN ROBERTSON

Questions by Mr. Berry.

Q. Would you state your name to the Jury, please?

A. Ah---Mary Ann Robertson.

Q. And what is your occupation or profession?

Q. Her eyes were pretty swollen?
A. Yes, Yes, she had perspired quite a bit, she---she was really pitiful.
Q. Were there----were there any bruises about the body?
A. On the right shoulder there was some minor bruises and some marks on the inner right thigh. They were not bruised yet, they were marks, and I don't, I did not see her after that morning, so I do not know what developed after that.
Q. But there were marks on her body?
A. Yes. Yes, there were.
Q. Did you also---did you also have the opportunity on the morning of November the 8th, 1972, --ah--to observe a Melinda Stanbaugh?
A. Yes, I did.

BROWN: And at this time, Your Honor, --ah--several objections, the first place I'd like to call the Court's attention to the three affidavits here, and no place in those affidavits is the name of Melinda Stanbaugh, or whatever her name is, appear. The defendant is on trial for what, if anything happened late at night or early morning on the 8th and 9th of November, involving the person whose named in the affidavit as Bonnie May, Bonnie Diane May. And I think anything else is--ah--certainly beyond the scope of this, and designed

only to inflame prejudicially the Jury against my client in this case.

BERRY: I'll withdraw it, Judge. He doesn't want the Jury to hear it. OK. I'm sorry----

BROWN: I'd like the----

COURT: The Court will admonish the Prosecutor to refrain from extra statements. The Court will also admonish the Jury to disregard the last statement made by the Prosecutor.

WRIGHT: Your witness.

BROWN: My witness. I have no questions, thank you.

COURT: Thanks very much.

(WITNESS EXCUSED)

DR. SHERRELL ROGERS, a witness for the State of Indiana, and having been first duly sworn, testified as follows, the examination being conducted by Ralph Berry, Prosecuting Attorney.

DIRECT EXAMINATION OF DR. SHERRELL ROGERS

Questions by Mr. Berry.

Q. Would you state your name to the Jury, please?

A. Robert Sherrell Rogers, M.D.

Q. And where do you practice medicine, Doctor?

A. At the student--ah--Health Center, Indiana State University.

Q. And where did you graduate from medical school?

A. The medical University of South Carolina.

CERTIFICATION

1173 S 225

Robert Wayne Austin

vs.

State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original testimony of Mary Ann Robinson, pages 745, 749, 750 as contained in the Record of Proceedings filed on Feb. 15, 1974, as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 23rd day of April, 1975.

Billie R. McCullough

BILLIE R. McCULLOUGH, CLERK
INDIANA SUPREME COURT

(STATE'S EXHIBITS NUMBER THIRTY-ONE AND THIRTY-TWO SHOWN TO THE JURY)

COURT: Finished?

BERRY: Yes.

COURT: Your witness, Mr. Brown.

BROWN: Sir?

COURT: Your witness.

BROWN: Oh, I'm sorry. You through? I have no questions.

(WITNESS EXCUSED)

DONALD TRYON, a witness for the State of Indiana, and having been first duly sworn, testified as follows, the examination being conducted by Robert Wright, Chief Deputy Prosecuting Attorney.

DIRECT EXAMINATION OF DONALD TRYON

Questions by Mr. Wright.

Q. Please state your name to the Jury?

A. Donald Tryon.

Q. And what is your address?

A. 1445 South 25th Street.

Q. And what is your occupation or profession?

A. Assistant Director of Security at Indiana State University.

Q. And--an--how long have you been so employed?

A. 5½ years.

Q. Prior to being employed by the University Security Office, where were you employed?

A. Terre Haute City Police Department.

Q. How long did you work for the Terre Haute City Police Department?

A. Twenty years.

Q. Referring to State's Exhibits 23 and 24, what, based on your investigation, what alleged crime had occurred at these particular places?

BROWN: Now then at this time,--ah--I think the question...

WRIGHT: If I may continue.

BROWN: ...the question is slightly different than it was before...

COURT: Yeah, I think it is.

BROWN: ...and I want to renew my objection.

COURT: OK. OK. Hold on...I...I don't... I won't...withdraw that last question, Mr. Prosecutor? Will you, please?

WRIGHT: OK. I'll withdraw the question.

COURT: Miss Reporter, play back the last question.

(REPORTER PLAYS BACK LAST QUESTION)

Q. What alleged crime had taken place at these particular places?

A. The alleged rape of Melinda Stanbaugh.

BROWN: I move that all be stricken, as it's definitely the--ah-- last answer, move that go out, because it's beyond the issues raised in this case, this man is charged with one offense and one...

COURT: Overruled.

BROWN: OK.

Q. Now--ah--where did you go after visiting the--an--that particular

WITNESS: Not of my Constitutional Rights. No.

WRIGHT: And you did--ah-- the explanation of Constitutional Rights are what's been marked as State's Exhibit Thirty-four, that is your signature?

WITNESS: Yes, sir.

WRIGHT: And--ah--that is your initials at the answer to each one of these questions?

WITNESS: Yes, sir.

WRIGHT: And did you understand your rights?

WITNESS: I thought I did.

WRIGHT: OK. You understood what they had read to you?

WITNESS: Yes.

WRIGHT: And they read it to you and you followed it along? Did they read...

WITNESS: Yes.

WRIGHT: No more questions.

COURT: All right.

BROWN: That's all.

COURT: Any other testimony, Mr. Brown?

BROWN: Sir.

COURT: Any other testimony?

BROWN: No other testimony, no, sir.

COURT: OK. So what's your argument, Mr. Brown?

BROWN: Now then--ah--teems, seems the first

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place, I think the--an-- statement which the Prosecutor indicated he would offer into evidence which was taken shortly after the explanation was signed--ah--ah--was in fact signed by Mr. Austin, after he was promised --ah--as he just testified about, that if he were truthful with his statements that--ah--that they would not file any other charges and the Court of record will show that you've got two additional charges filed. Ah--now--ah-- and I would think that if this doesn't --ah--if the Prosecutor said he planned to offer---were admissible, for any purpose, it would be only-- ah--anything that he might have said or written, would be admissible only as to the charge of rape which alleged ---was alleged to have occurred on November the 8th of 1972, involving Bonnie Diane May. And I think that anything else that he might have said or anything that he might have signed, if anything, would--an--not be admissible into evidence.

WRIGHT: I'd like...

COURT: You mean in another---in another charge, or---in another--ah--ah-- charge arising on different facts and circumstances that were--are different from the 9th and early morning hours of November 8th and November 9th?

BROWN: Yes, sir. I think that anything that I might have said after in custody, on anything that happened in any connection...

COURT: Are you refer---referring to the-- ah--the other girl...

BROWN: Whether it's Melinda Stanbaugh or whether it's the --ah-- first girl that testified, or whether it's kidnapping or sodomy charge that is currently being tried here today, I think that anything he might have said or signed in connection with that should be inadmissible. I think that at best that if anything would be admissible it would be only for the specific purpose of what he might have said in connection with the rape charge which was additionally filed but--ah--and as I recall I think

it was filed the same day that he was arrested.

COURT: But you're not objecting to it being ---to be admiss---to be admitted into evidence before this Jury?

BROWN: Yes, sir. I am. For the reason that according to the undisputed testimony here, he was told that if he were truthful in the rape charge, they wouldn't file anything else. That's my understanding of what he said was...

WRIGHT: The State of Indiana would like to call Don Tryon back to the stand.

BROWN: Well, I think we'd object at this time, because he--ah....

WRIGHT: If there's a hearing outside the presence of the Jury, who's going to hear him?

BROWN: Well, I think the hearing was over with. You didn't offer any evidence until after I made my arguments.

WRIGHT: You made your arguments too quick.

COURT: Mr. Brown--ah--the Prosecutor didn't want anymore evidence out of the testimony, out of your client--ah-- if he wants to call Mr. Tryon, he can.

WRIGHT: Yes, at this time the State of Indiana would offer into evidence what's been marked as for purpose of identification as State's Exhibit Thirty-four.

COURT: All right.

BROWN: The objection is already...

COURT: I'm going to overrule that objection, Mr. Brown. Lets get on with it.

BROWN: All right now--ah--...

COURT: You don't have to go now--ah-- he's going to offer, I'm sure the signed statement. Are you going to object to that? The same reasons?

BROWN: Yes, sir. And--an--

COURT: Do you have anything else, anything other---other argument, other than else, outside the hearing of the Jury you want to now, I'll wait to the Jury comes back and get this in. Any other reasons?

BROWN: Well--ah--for the same reasons that I've stated before--ah--

COURT: OK. That will be overruled.

BROWN: And--ah-- that--an--that if the Court does overrule the objection and let that Exhibit into evidence, then I

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would --ah-- like the Court to order it--ah--admitted only for the purpose of whatever light it might bring on the one charge of rape, alleged to have happened on Bonnie Diane May, on the 8th day of May,--- April---ah--November, 1972, and for no other reason.

COURT: OK. Overruled.

WRIGHT: I think we can move--to--ah-----any other facts that are before this Jury as to other sex offenses that have been brought out, that we can also introduce--ah--any admission that he may have made as to those facts.

BROWN: I think not, under the evidence that was here, at this point the...Mr. Tryon testified as to what happened when he wasn't there, of course he doesn't know the evidence the...when you get into the list of this thing anyway--ah--when you get into reading it, why are you here, on the charge of rape, and that's the only thing that's ever mentioned in this statement and this, I think, substantiates his comment that he was told that (Inaudibl

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WRIGHT: He was arrested at that time on a rape charge.

BROWN: That's right. And that...

WRIGHT: But there were additional charges that arose out of our investigation.

BROWN: Four days later...

COURT: Mr. Brown, I...

BROWN: ...and three and a half months later...

COURT: Mr. Brown, I'm---I'm going to---I'm going to--ah--put it into evidence and let the Jury--ah-- give it the proper weight.

BROWN: Well, I think--ah--my contention is those that--ah--anything in connection with--ah--that he might have said--- er--ah--signed, that would have anything to do with anything other than this one rape, based on the evidence produced here--ah--should be--ah--kept from the Jury, because of the...I don't know what he was told, but I've got an idea.

COURT: That brings it, the question up, Bob.

(ATTORNEYS APPROACH THE BENCH)

COURT: Objections overruled, Mr. Brown. These--an-- the --ah--Court was found that the defendant has been duly---

was at that time duly advised of his Constitutional Rights, anything he signed or may have said--ah-- will be admitted into evidence.

BROWN: Without restrictions?

COURT: Ah---the restrictions will be as to any --ah--evidence which apprised --ah--which is revelant to this particular charge or other--ah--sex offenses in which the--ah--the Court has already allowed testimony---to be into evidence. Enter it into the record.

BROWN: In other words, you---your ruling, if I understand it correctly, is the Stanbaugh girl and whatever that other one the.....

COURT: Right.

BROWN: ...the gate's wide open?

COURT: For those three--ah-- Mr. Brown. Well, for those two, really---really, just two.

BROWN: That's the Stanbaugh girl and the May girl?

COURT: Stanbaugh and--ah-- May. All right, get the Jury, Mr. Bailiff.

BROWN: I think some place along in there I

mentioned as one of the reasons inducements or something along that line, I think I got that word in the objection, if I didn't, I'd like to have it in there.

COURT: Yeah...Overruled. Now, Mr. Brown, this applies to----this applies to written and oral statements.

(JURY RETURNED TO COURT ROOM)

(COURT ADMONISHED JURY)

(NOON RECESS)

(TRIAL RESUMES WITH JURY)

COURT: Lets see, Mr. Prosecutor, you moved for the--ah--admission of State's Exhibit...

WRIGHT: Thirty-four.

COURT: Thirty-four into evidence. Objection heretofore made and for his reasons--ah--denied and overruled. Let the record show that State's Exhibit Thirty-four is offered and accepted into evidence over the objection of attorney for the defendant.

STATE'S EXHIBIT NUMBER THIRTY-FOUR IS IN THE FOLLOWING WORDS AND FIGURES, TO-WIT:

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A. That's right.

Q. And--ah--who was present in that room at that time?

A. Mr. Austin--ah--myself, Detective Michaels, and Detective Ray Tryon, and Detective Wirtz.

BROWN: The last name, sir?

WITNESS: Wirtz.

Q. And--ah--what took place in that room?

A. From approximately six-thirty to seven o'clock--ah--Mr. Austin was interviewed, pertaining to--ah--the cases of Miss Bonnie May and Miss Melinda Stanbaugh.

Q. And what, if anything, did he state during this period of time?

BROWN: Now the--an--I have a question, if I may.

COURT: You may.

BROWN: Was--an--a typewritten signed statement given or made by Mr. Austin during the time that--ah-- you fellows and Mr. Austin were together in the--ah-- office, the second place, the second room that---that you referred to?

WITNESS: Yes, it was, approximately thirty minutes after the interview.

BROWN: All right, sir, I think--an--we'll object --any--if there was something that was--an--typed out and signed by Mr. Austin, if it would be admissible it would be the best evidence and if

BROWN: was--ah--some of the conversation that you, were asked about, summarized or whatnot, and contained in the typewritten signed statement?

WITNESS: The typewritten statement pertained to only one case.

BROWN: And I'll ask you whether or not--ah--Mr. Austin was under arrest at the time the interrogation commenced?

WITNESS: He was.

BROWN: And--ah--would that be on the charge of rape involving Bonnie Diane May?

WITNESS: He was. That's correct.

BROWN: Was he under arrest at---for any other thing at that particular time?

WITNESS: Not at that particular time, no, sir.

BROWN: All right then, now based on the information produced by this witness, the defendant will renew the objection to testimony --an--at first, the--- ah--testimony here was under arrest for the charge of rape involving Bonnie Diane May on November 6th, 1972, and not in custody for any other reason, under arrest. And that--ah--he--ah--its been offered and admitted into evidence the waiver of the

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Constitutional Rights, which as I understand the testimony, was taken just a matter of moments after he reached the City Hall and was arrested on a rape charge. It said in there that he--ah--as Mr. Wright read, he was willing to answer the questions and--ah--ah--does not refuse to answer any questions and that--ah--at this this time he was charged only with the rape.

COURT: Overruled.

BROWN: And--ah--for the further reason that --ah--we have only the--ah-- three charges involving what happened if anything with Bonnie Diane May on November 8th, 1972, so anything else would be extensive to the issues here.

COURT: Overruled.

Q. Mr. Tyson, would you relate to the Jury what statement if any the defendant made, between the hours of 6:30 and shortly after 7:00 o'clock on that particular evening relative to the--ah-- charges pending in this particular trial and also any charges, and also as to any facts surrounding Melinda Stanbaugh?

A. He was questioned pertaining to the Bonnie May case, in reference to the report that we had had from Bonnie May, in her reference to- ah--forcing her into the automobile--ah--take, taking her to an

COURT: Sustained.

Q. OK. After the preliminary discussion with--ah--Mr. Austin, did you question him at that time in reference to--ah--facts and circumstances surrounding Melinda Stanbaugh?

A. We did.

BROWN: [redacted] in addition to the continuing objection, the additional objection, as earlier stated.

COURT: Continuing--ah-- Overruled that objection.

Q. OK. And what did--an--what questions did you ask Mr. Austin in reference to--ah-- (Inaudible) ?

A. I asked him if he did, in fact, approach a young lady on Sixth Street--an--just south of Chestnut Street--ah--on the morning of November the 9th,--ah--November the 8th. He stated, Yes. Ah-- We asked him if he, in fact, forced her into the automobile, his answer was, Yes. If he took her to an area out in the country, his answer was, Yes. Ah---if he did, in fact, perform an act of cunningulis on her, his answer was, Yes. If he forced her to commit an act of feliatio on him, his answer was, Yes. Ah--Did he have sexual relations with this young lady, his answer was, Yes.

Q. Did he say anything to you in reference to--ah--choking Melinda Stanbaugh?

A. Yes, sir. He did.

Q. Now--an--do you recall specifically what he said in that regard?

A. He was asked if he, at any time, placed his hands on the throat

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of either one of the subjects, and he said, Yes, to both subjects. He did not--ah-- to my knowledge--ah-- state how many times.

Q. OK. At that time--ah--what did you do?

A. After the--ah-- (Cough) Excuse me. After the--an--initial interview Mr. Austin on--an--both victims--ah-- he was asked if he was willing to gave ---give a statement, a signed statement, --ah--pertaining to Miss Bonnie May.

Q. And what was his response to that?

A. Yes, he was willing.

Q. I'll hand you what's been marked for purpose of identification as State's Exhibit Thirty-five, can you identify that?

A. It's the original copy of the signed statement by Mr. Austin.

Q. And did you see him sign each of those pages?

A. I did.

Q. And did you witness that signature by your own signature?

A. I did.

COURT: Any objection, Mr. Brown?

BROWN: Yes, sir.

COURT: Give me your reasons.

BROWN: Sir.

COURT: Give me your reason, Mr. Brown.

BROWN: Um---the--an-- the reasons, I think it was brought out in a hearing that--ah-- this statement was--an-- given by Mr. Austin as a result of promises made to him.

WRIGHT: Your Honor, I'm going to object to

explain this? And his answer to that was, that what is abnormal to some people is normal to other people, and this is what he had in mind that this was not abnormal to him.

Q. And what other question did you ask him pertain to?

A. The other question pertaining to--ah--an-- the forcing into the automobile and again with, in which he answered in the statement, we had a disagreement, a mild disagreement, and I put her in the car, in which he admitted---at that time that he did...

BROWN: I'd like the word admitted go out...

COURT: I'll sustain it.

Q. And what did he state at that time?

A. He stated that he did in fact force her into the automobile by taking her by the throat.

Q. OK. Am--what did you do next do in the reference to your investigation in the case of the alleged crime surrounding Bonnie Diane May?

A. Nothing to the reference of Bonnie Diane May.

Q. Nothing on that particular evening?

A. That's right.

Q. OK. Ah--Then did you do anything the following day, Saturday, November the 11th, 1972?

A. Not in reference---no, sir.

Q. Did you--ah--do anything else in reference to the investigation of this particular case?

A. Not on Bonnie May.

Q. Anything else in reference to the investigation...

BROWN: Objection...

Q. ...of Melinda Stanbaugh?

BROWN: ...the same objection continuing, please.

COURT: Overruled.

A. Yes, sir, I--ah--Melinda Stanbaugh had gone home--ah--on the 8th, after she was released from the hospital and didn't return to campus until I believe late Sunday evening, the 12th. I did contact Melinda in the late afternoon on the 13th, on Monday, and--ah--took a written statement from Melinda.

Q. OK. And that statement contained the facts and circumstances as surrounding the sex offenses committed on her, like sex offenses committed on her?

A. On Melinda Stanbaugh, that's correct.

WRIGHT: I have nothing further.

COURT: The Court will be in recess for five minutes.

(RECESS)

CROSS EXAMINATION OF DONALD TRYON

Questions by Robert H. Brown.

Q. For the sake of the record, would you state your name again, please?

A. Donald Tryon.

Q. And you were the witness testifying just before the recess, sir?

A. I was.

Q. All right, thank you. Now--ah--getting to--ah--the evening of November the 10th, I think you said that you saw Mr. Austin on the first occasion that evening at the Detective Assembly in City Hall?

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CERTIFICATION

1173 S 225

Robert Wayne Austin

vs.

State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original testimony of Donald Tryon, pages 763,785,793-796, 807-811,814,817,818,823,824,830,831 as contained in the Record of Proceedings filed on February 15, 1974, as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 23rd day of April, 1975.

Billie R. McCullough

BILLIE R. McCULLOUGH, CLERK
INDIANA SUPREME COURT

A. Yes, he reserved the right to condense his statement. He stated that he definitely would not put everything that he, that we discussed in this statement.

Q. Was there anything said concerning any unnatural sex act after the taking of statement?

A. No. Not that I can recall.

Q. You don't recall?

A. I don't recall at this time.

Q. Did you have any conversation with him that evening concerning Belinda Stanbaugh?

BROWN: Objection for the additional reason and continuing as before.

COURT: All right, same ruling. Overruled.

A. I did.

Q. And would you relate to the Jury what conversation you had with the defendant was concerning Belinda Stanbaugh?

A. The conversation was that the defendant was in reference to clearing, the clearing of records in reference to any other offenses, which he did cooperate and advise that since he told about one he just as well tell about the others. And he did clear some other cases.

Q. And what facts did he give you concerning Belinda Stanbaugh?

A. He stated that he was responsible for taking this young lady, picking her up at the college, and taking her to an area of, immediately north of the Wabash River bridge on 63, going back to a, an area which was a deadend road, which he stated he was familiar with as he had hunted or fished or something within this

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area before and where he had had intercourse with Belinda Stanbaugh.

Q. After the interview with him did you later have the occasion to go to the scene--ah--where these offenses occurred with the defendant?

A. Yes, on Saturday, November 11.

Q. And what time of the day was that, Ray?

A. I belive it was in the neighborhood of nine or ten o'clock, to the best of my recollection.

Q. And would you tell the Jury where you went with the defendant and who was with you?

A. At seven o'clock A.M., November 11th, 1972, the Chief of Detectives, Frank Hoffman, Detective Michaels, and myself, and Indiana State University Officer, Chris Lester accompanied Robert Wayne Austin to Putnamville, Indiana, the location of the Indiana State Police Post, where a polygraph----

BROWN: Now, wait a minute. Now listen here, I move for a mis-trial.

COURT: All right. That's denied. Move for anything else, Mr. Brown?

BROWN: Move for everything he said about that go out.

COURT: All right. Ladies and Gentlemen of the Jury, the Court would admonish you that the last statement made by Officer Tryon be totally disregarded in terms of his testimony and give it

A. November 11, 1972.

Q. November 11, 1972?

A. Yes, sir.

Q. And I'll hand you what's been marked State's Exhibit Number 24, 9, 10, and 23 and ask you to tell the Jury what they are?

A. State's Exhibit Number 24, State's Exhibit 23 are photos of the admitted assault and intercourse with a Mrs. Stanbaugh.

BROWN: Now I'll move the volunteered comments be stricken and the Jury be admonished to disregard it completely. The witnes was asked if he could identify it and he can answer that yes or no, and if he knows the location of the place he has a right to answer that but the volunteered comment, I think should be stricken from the record with the usual admonition and the witness instructed to refrain from such type of comment in the future.

COURT: Mr. Brown, what---what portion of that statement?

BROWN: Ahhh---

COURT: Admitted---

BROWN: Admitted this and that and the other.

COURT: Admitted assault?

BROWN: Yes, sir.

COURT: And intercourse?

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CERTIFICATION

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Robert Wayne Austin
vs.
State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original testimony of Raymond Tryon, pages 848, 849, 851 as contained in the Record of Proceedings filed on Feb. 15, 1974 as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 23rd day of April, 1975.

Billie R. McCullough

BILLIE R. McCULLOUGH, CLERK
INDIANA SUPREME COURT

Questions by Mr. Brown.

Q. Tell me, Mr. Swift, was it the--ah--the reason that --ah--you and Mr. Michaels--ah--were present, was in order that he could sort of eavesdrop and use this against him?

A. No, sir.

BROWN: That's all.

WRIGHT: You may step down.

JAMES MICHAELS, a witness for the State of Indiana and having been first duly sworn, testified as follows, the examination being conducted by Mr. Ralph Berry, Prosecuting Attorney.

Questions by Mr. Berry.

COURT: Mr. Brown, come here. Mr. Prosecutor, Mr. Michaels , come here.

(ATTORNEYS AND WITNESS APPROACH THE BENCH)

Q. Will you state your name to the Jury, please?

A. James Michaels.

Q. And what's your occupation or profession?

A. Terre Haute City Police Officer, Detective.

Q. And what's your, what's your rank on the police department?

A. Detective.

Q. And you're presently assigned to the Prosecutor's Office?

A. Yes, sir.

Q. And you were assigned to the Prosecutor's office on November the 8th, 1972?

A. Yes, sir.

Q. Ah---You're acquainted with Detective Leon Wirtz, aren't you?

A. Yes, sir.

-house would--ah--make him more susceptible to the pressure.

COURT: Overruled.

Q. Did Mr. Austin make the, the, on that afternoon any voluntary statement?

A. Yes, sir.

Q. And would you relate to the Jury what those statements were?

BROWN: At this time I'd like a continuing objection--ah-- based on what I said before.

COURT: Overruled.

A. He--ah--made the statement to me that he had been thinking all night, the prior night in jail, about when the first time that he felt that he had actually --ah--forcibly committed an assault on a woman.

BROWN: Now--ah--like to approach the Bench before he goes any further. I'd... Yeah....

(ATTORNEYS APPROACH THE BENCH)

COURT: Objection overruled.

A. He stated that as close as he could remember, that approximately four to five years ago he was living with a girl friend and that he went home one evening and he explained that he could have very easily went home and went to bed with her without any problems and everything would have been a normal night, but he said this particular evening he got the urge to force her. So he went in and he grabbed her and he forced her. Ah---And he stated that he

was at the Terre Haute Police Department.

COURT: Denied.

BROWN: The defendant moves to strike the entire testimony of State's witness, James Swift, concerning anything that the Chief testified to after the statement by the defendant around 8:00 o'clock on the evening of November 10, 1973, and more specifically the Chief's testimony concerning the conversation between father and son that took place in the police station.

COURT: Denied.

BROWN: Again, move to strike the entire testimony of former police officer, Raymond Tryon, concerning anything which might or might not have happened or occurred following the signing of said statement by the defendant.

COURT: Denied.

BROWN: As to all the witnesses that were called by the State of Indiana and testified, the defendant wishes to strike the entire testimony of each and everyone of those witnesses that pertained in any way to anything that

might or might not happened involving the defendant other than as concerns Bonnie Diane May.

COURT: Denied.

BROWN: And --ah-- as to State's witness. Donald Tryon, the State moves to strike from the record the entire testimony of Mr. Tryon relative to anything that--ah--he testified about which occurred after the signing of his statement by the defendant.

COURT: Denied.

BROWN: By me.

COURT: All right, let the record show that the defendant moves rather than the State moves.

BROWN: The defendant further moves to strike from the record--ah--State's Exhibit Thirty-four for the same reason the introduction there to the witness.

COURT: Objection?

BROWN: And also for the same reason the defendant wishes to strike the signed statement that was introduced into evidence signed by the defendant for the reasons that were given at the time of the objection, time it was

introduced, by not being advised that he had only one charge, that--ah--things of that nature.

COURT: Denied.

BROWN: All right.

(ATTORNEYS APPROACH THE BENCH)

BROWN: The defendant moves that the entire testimony of Suzanne Little be stricken from the record because --ah--it has nothing to do with what the defendant is charged with here in this Court.

COURT: Denied.

BROWN: Ah---And as to the...still to Suzanne Little, the defendant moves to strike from the record the instant identification by Suzanne Little of the defendant for the reason that--ah--improper identification, pre-trial technics, the used in that the...

WRIGHT: Pardon me?

BROWN: ...certain improprieties was further aggravated by her being shown the pictures of the defendant just several days before the trial.

COURT: Denied.

BROWN: First the...the defendant first move, strike the testimony and--ah--relative

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to and the in Court identification of the State's witness, Belinda Sue Stanbaugh --ah--for the reason that used improper identification technics and improprieties of further aggravated by, --ah-- what she said concerning identification just a few days before trial.

COURT: Denied.

BROWN: And the defendant moves that the entire testimony of Belinda Sue Stanbaugh be stricken from the record for the reason that--ah--the defendant here is not charged with violation of any law that happened in connection with anything that might or might not have happened with Belinda Sue Stanbaugh.

COURT: Denied.

BROWN: The defendant moves to test...to strike from the record the testimony of the State's witness, Mary Robinson, relative to--ah--so called history that she was testifying about, supposingly given to her by--ah--Bonnie Diane Ray, being hearsay and outside the hearing presence of the defendant.

COURT: Denied.

ation with counsel and both of his parents the, the defendant elected to take advantage of his Constitutional Rights not to testify.

COURT: OK. Any other motions?

BROWN: And at the close of all of the evidence the defendant again moves for a directed verdict of not guilty on all three charges for the reasons stated in support thereof at the conclusion of the State's case in chief, and for the additional reason that--an--both the --ah-- sodomy and rape statutes in Indiana are in violation of the 14th Amendment of the United States Constitution and--ah--in violation of other provisions of the US Constitution and the Indiana Constitution of 1851.

COURT: All right. Motions denied. Mr. Bailiff, get the Jury.

(AND THAT WAS ALL OF THE EVIDENCE HAD IN THIS TRIAL)

CERTIFICATION

1173 S 225

Robert Wayne Austin
vs.
State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original testimony of James Michaels, pages 888,893,897-900,917 as contained in the Record of Proceedings filed Feb. 15, 1974, as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 23rd day of April, 1975.

Billie R. McCullough

BILLIE R. McCULLOUGH, CLERK
INDIANA SUPREME COURT

IN THE

SUPREME COURT of the UNITED STATES

October Term 1974

No._____

Robert Wayne Austin,

Petitioner

vs

State of Indiana,

Respondent.

Appendix C - Additional Portions of Record wherein federal question was raised

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Appendix C - Portions of Record wherein Federal Question was Raised

A. Motion to Correct Errors (partial)

B. Brief of Petitioner before Indiana Supreme Court (partial)

STATE OF INDIANA)
) SS:
COUNTY OF VIGO)

IN THE VIGO CIRCUIT COURT

CAUSE NO. C.CC-72-173

FILED
CLERK OF THE
CIRCUIT COURT OF VIGO COUNTY
MAY 31 1973
Leland Rawson
CLERK

STATE OF INDIANA

VS.

ROBERT WAYNE AUSTIN

MOTION TO CORRECT ERRORS

Comes now the defendant by his attorney of record and files the following Motion to Correct Errors and in support thereof alleges the following grounds, causes and reasons, to-wit:

1. The verdict of the jury is contrary to law.

2. The verdict of the jury is not sustained by sufficient evidence.

3. Error of law occurring in the trial in this, the Court gave over defendant's objection State's tendered Instruction No. 2, as amended.

4. Error of law occurring at the trial in this, the Court gave over objection of the defendant State's tendered Instruction No. 3.

5. Error of law occurring at the trial in this, the Court gave over defendant's objection State's Instruction No. 4.

6. Error of law occurring at the trial in this, the Court gave over the objection of the defendant State's tendered Instruction No. 6.

7. Error of law occurring at the trial in this, the Court gave over the defendant's objection State's tendered Instruction No. 7.

8. Error of law occurring at the trial in this, the Court gave over the objection of the defendant State's Instruction No. 8.

9. Error of law occurring at the trial in this, the Court gave over the objection of the defendant State's tendered Instruction No. 9 as amended.

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10. Error of law occurring at the trial in this, that the Court gave over the objection of the defendant State's tendered Instruction No. 10 as amended.

11. Error of law occurring at the trial in this, that the Court gave over the objection of the defendant State's tendered Instruction No. 2 as amended.

12. Error of law occurring at the trial in this, that the Court refused to give defendant's tendered Instruction No. 9.

13. Error of law occurring at the trial in this, that the Court overruled the defendant's motion for directed verdict of not guilty at the close of the State's evidence.

14. Error of law occurring at the trial in this, that the Court overruled defendant's motion for directed verdict at the close of all of the State's evidence.

15. Error of law occurring at the trial in this, that the Court overruled defendant's motion for mistrial during State's closing argument.

16. Error of law occurring at the trial in this, that the Court overruled the defendant's motion for mistrial at the conclusion of the State's closing argument.

17. Error of law occurring at the trial in this, that the Court admitted into evidence over the objection of defendant State's Exhibit 25.

18. Error of law occurring at the trial in this, that the Court admitted into evidence over the objection of the defendant State's Exhibit 26.

19. Error of law occurring at the trial in this, that the Court admitted into evidence over the objection of the defendant State's Exhibit 27.

20. Error of law occurring at the trial in this, that the Court admitted into evidence over the objection of the defendant State's Exhibit 28.

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21. Error of law occurring at the trial in this, the Court admitted into evidence over the objection of the defendant State's Exhibit 29.

22. Error of law occurring at the trial in this, the Court admitted into evidence over the objection of the defendant State's Exhibit 30.

23. Error of law occurring at the trial in this, the Court admitted into evidence over the objection of the defendant State's Exhibit 34.

24. Error of law occurring at the trial in this, the Court admitted into evidence over the objection of the defendant State's Exhibit 35.

25. Error of law occurring at the trial in this, the Court overruled defendant's objection to question by State to State's witness Donald Tryon questioning whether the subject fitted the description of an alleged assailant.

26. Error of law occurring at the trial in this, the Court overruled defendant's objection to question to State's witness Donald Tryon "Did you confirm the location?"

27. Error of law occurring at the trial in this, the Court overruled defendant's objection to question to State's witness Donald Tryon "Did you have any specific information?", referring to State's Exhibits 23 and 24.

28. Error of law occurring at the trial in this, the Court overruled defendant's objection to question put to State's witness Donald Tryon concerning what information he secured concerning alleged criminal offenses.

29. Error of law occurring at the trial in this, the Court overruled defendant's motion to strike the testimony of State's witness Donald Tryon in response to the question objected to as set out in the next preceding specification of error.

30. Error of law occurring at the trial in this, the Court overruled defendant's objection to question put to State's witness Donald Tryon calling for testimony concerning conversation with this defendant relative to State's witnesses Bonnie Diane May and Melinda Stanbaugh.

31. Error of law occurring at the trial in this, the Court overruled defendant's objection to question put to State's witness Donald Tryon concerning conversation by witness with defendant concerning Bonnie Diane May.

32. Error of law occurring at the trial in this, the Court overruled defendant's continuing objections to all questions put by the State to State's witness Donald Tryon concerning an alleged conversation between defendant and the said Donald Tryon concerning alleged activities of the defendant concerning the said Bonnie Diane May.

33. Error of law occurring at the trial in this, the Court overruled defendant's continuing objection to questions put by the State to State's witness Donald Tryon concerning an alleged conversation between said State's witness and this defendant concerning what the defendant allegedly told said witness of his activities concerning State's witness Melinda Stanbaugh.

34. Error of law occurring at the trial in this, the Court overruled defendant's objection to question put to State's witness Donald Tryon concerning an alleged conversation in which the defendant allegedly said "What is abnormal to some is not abnormal to others"

35. Error of law occurring at the trial in this, the Court overruled defendant's continuing objection to questions put to State's witness Raymond Tryon concerning a conversation allegedly had with the defendant after the defendant had given an allegedly written statement concerning the charges.

36. Error of law occurring at the trial in this, the Court overruled defendant's motion for a mistrial immediately after State's witness Raymond Tryon testified "At 7:00 o'clock A.M. November 11, 1972, the Chief of Detectives, Frank Hoffman, Detective Michaels and myself and Indiana State University Officer, Chris Lester, accompanied Robert Wayne Austin to Putnamville, Indiana, the location of the Indiana State Police Post, where a polygraph ..."

37. Error of law occurring at the trial in this, the Court overruled defendant's renewed motion for mistrial following the recess immediately after the previous motion for mistrial was denied.

38. Error of law occurring at the trial in this, the Court overruled defendant's objection to questions to State's witness James Swift concerning conversation allegedly held with the defendant in the Terre Haute Indiana Police Department following the taking of a signed statement from the defendant.

39. Error of law occurring at the trial in this, the Court overruled the defendant's objection to question to James Swift concerning conversation allegedly overheard by State's witness Swift between defendant and defendant's father at the Terre Haute Police Station.

40. Error of law occurring at the trial in this, the Court erred in overruling defendant's motion to strike testimony of State's witness James Michaels concerning what witness thought happened and his testimony concerning an alleged conversation between defendant and said witness Michael.

41. Error of law occurring at the trial in this, the Court overruled defendant's objection to comments by the Prosecuting Attorney on his opening statement referring to expected evidence concerning one Melinda Stanbaugh who is not the complainant in this cause.

42. Error of law occurring at the trial in this, the Court overruled defendant's objection to comments by the Prosecuting Attorney in his opening statement referring to expected evidence concerning one Susan Little who is not the complaining witness in this cause.

43. Error of law occurring in the trial in this, the Court overruled defendant's objection by State to witness Susan Little during a hearing outside the presence of the jury concerning similarity of characteristics of persons contained in four separate photographs.

44. Error of law occurring in the trial in this, the Court overruled the defendant's objection to in court identification by State's witness Susan Little of one of four photographs as being a person who allegedly chased her about 9:00 o'clock P.M. on the 8th day of November, 1972.

45. Error of law occurring at the trial in this, the Court overruled defendant's objection to the in court identification by State's witness Susan Little of the defendant as a person who chased her about 9:00 o'clock p.m. on the 8th day of November, 1972.

46. Error of law occurring at the trial in this, the Court overruled defendant's objection to the second in court identification of the defendant by State's witness Susan Little.

47. Error of law occurring at the trial in this, the Court overruled defendant's continuing objection to questions put to State's witness Susan Little concerning what this defendant did or did not do at approximately 9:00 p.m. on November 8, 1972.

48. Error of law occurring at the trial in this, the Court overruled defendant's motion to strike the entire testimony of State's witness Susan Little.

49. Error of law occurring at the trial in this, the Court overruled defendant's continuing objections to questions propounded to State's witness Melinda Sue Stanbaugh concerning her activities on November 8, 1972.

50. Error of law occurring at the trial in this, the Court overruled defendant's objection to the in court identification by State's witness Melinda Sue Stanbaugh of the defendant as the person she saw and was with on November 8, 1972.

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51. Error of law occurring in the trial in this, the Court denied the defendant's motion to strike the entire testimony of State's witness Melinda Sue Stanbaugh.

52. Error of law occurring at the trial in this, the Court denied defendant's motion to strike the testimony of State's witness John Briggs after he testified that State's witness Bonnie Diane May "Wanted to go out".

53. Error of law occurring at the trial in this, the Court overruled defendant's objection to question propounded to State's witness Mary Ann Robertson calling for "case history" given to the witness by State's witness Bonnie May.

54. Error of law occurring at the trial in this, the Court overruled defendant's objection put to State's witness Shirell Rogers, M. D. calling for testimony concerning statements made to witness Rogers to witness Bonnie May.

55. Error of law occurring at the trial in this, the Court overruled the defendant's objection to comments made by Prosecuting Attorney Ralph Berry during State's closing argument relative to misstatement of witness James Michael's testimony, Prosecutor Berry saying that witness Michael testified that the defendant told him, Michael, that he, defendant, for about 5 or 6 years last past enjoyed forcing trials.

56. Error of law occurring at the trial in this, the Court denied defendant's motion for mistrial during the State's closing argument following comments by Prosecutor Berry that other crimes had been committed, no admonition given the jury to disregard, by the Court.

57. Error of law occurring at the trial in this, the Court erred in overruling defendant's objection to incorrect definition of the law of reasonable doubt by Deputy Prosecutor Wright during closing argument.

58. Error of law occurring at the trial in this, the Court overruled defendant's objection to comments by Deputy Prosecutor Robert Wright during his closing argument concerning an incorrect statement of the law concerning the burden of proof.

59. Error of law occurring at the trial in this, the Court overruled defendant's objections during the closing argument of Deputy Prosecutor Robert Wright to the continual reference by said Deputy Prosecutor to the crimes of rape.

60. Error of law occurring at the trial in this, the Prosecuting Attorney on many occasions during the course of the trial, including opening and closing statements, made remarks calculated solely to inflame the passions of the jury against the defendant sufficiently grave and sucefficntly inflammatory so as not to be correctable by occasional admonitions to the jury to disregard such comments.

61. Error of law occurring at the trial in this, a comment by the Deputy Prosecutor Robert Wright during the closing argument referring to "heinous crimes on these girls", such comments being so obviously prejudicial against the defendant that admonition by the Court to the jury to disregard the comment was insufficient to correct the damage already been done.

62. Error of law occurring at the trial in this, the Court overruled defendant's motion to strike testimony of State's witness Susan Little at the close of State's evidence in chief.

63. Error of law occurring at the trial in this, the Court overruled defendant's motion made at the close of all of the evidence to strike the entire testimony of State's witness Susan Little.

64. Error of law occurring at the trial in this, that the Court overruled defendant's motion to strike, at the conclusion of the State's evidence, the entire testimony of State's witness Melissa Stanbaugh.

65. Error of law occurring in the trial in this, the Court overruled defendant's motion to strike the entire testimony of the State's witness Melinda Stanbaugh at the close of all of the evidence.

66. Error of law occurring before the trial in this, the Court overruled defendant'f motion for change of venue from the county.

67. Error of law occurring before the trial in this, the Court overruled defendant's motion to require the State of Indiana to elect upon which charge it wishes to continue to prosecution.

68. Error of law occurring at the trial in this, the Court overruled defendant's motion to strike the special venire.

WHEREFORE, the defendant Robert Wayne Austin, by his attorney of record, respectfully prays the Court to sustain this Motion to Correct Errors and that a new trial be granted herein forthwith, and for all other further, proper and complete relief in the premises.

Dated this 31st day of May, 1973.

Respectfully submitted,

Robert Howard Brown
Attorney for Defendant

Robert Howard Brown
Attorney for Defendant
28 So. 5th St. - Rm. 11
Terre Haute, Indiana 47807

Telephone: 812-232-5833

I do hereby certify that I have delivered a copy of the above and foregoing by handing to Prosecuting Attorney attorney of record for State of Indiana this 31st day May, 1973.

Signature Robert Howard Brown

28 So. 5th St Terre Haute, Indiana 47807 — Tel. 812-232-5833

CERTIFICATION

1173 S 225

Robert Wayne Austin

vs.

State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original Petition for Writ of Error in cause No. C-CR-72-173, pages 10-18 in the Record of Proceedings filed on Feb. 15, 1974, as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 23rd day of April, 1975.

Billie R. McCullough

BILLIE R. McCULLOUGH, CLERK
INDIANA SUPREME COURT

IN THE

SUPREME COURT OF INDIANA

No. 1173 S 225

ROBERT WAYNE AUSTIN

Appellant (Defendant below)

VS.

STATE OF INDIANA

Appellee (Plaintiff below)

Appeal from the Vigo Circuit Court

The Honorable C. Joseph Anderson, Judge

BRIEF OF APPELLANT

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ISSUES PRESENTED FOR REVIEW

I. Did the court commit reversible error in allowing the state to present evidence of prior sexual offenses allegedly committed by the defendant despite the fact that the defendant was not charged with those offenses.

II. Did the court commit reversible error in failing to strike the entire testimony of Suzanne Little from the record because it had no bearing or materiality to the charge the defendant was facing.

III. Did the court commit reversible error in allowing alleged statements by the defendant as to his sexual conduct four or five years prior to trial into evidence.

IV. Did the mention of the word polygraph in relation to the defendant cause such prejudice to the defendant that a mistrial should have been granted.

STATEMENT OF THE CASE

On November 13, 1972, the defendant appellant Robert Wayne Austin was charged by affidavit with the crime of Rape on a Bonnie Diane May. On November 14, 1972, the defendant was charged with the crime of Kidnapping on the person of Bonnie Diane May, and on the 26th day of February, 1973, the defendant appellant was charged with the crime of Sodomy against Bonnie Diane May. The defendant was appointed Public Defender, Robert Howard Brown, as attorney in his case. On March 5, 1973, the trial of Robert Wayne Austin commenced

ARGUMENT

I. THE COURT COMMITTED REVERSIBLE ERROR IN ALLOWING TESTIMONY INTO EVIDENCE OF OTHER ALLEGED SEXUAL OFFENSES OF WHICH THE DEFENDANT WAS NOT CHARGED.

The State of Indiana introduced testimony from Melinda Stanbaugh concerning alleged acts committed by the defendant upon her in the early hours of November 8, 1972. Miss Stanbaugh testified that she was taken by force out of the area and forced to have sexual intercourse against her will. The defendant was not charged with having committed any acts against the person of Melinda Stanbaugh.

The general rule in Indiana is that in a prosecution for a particular crime, evidence which shows or tends to show that the defendant committed another crime wholly separate, independant and distinct from the offense for which he is on trial, even though it is a similar crime, is irrelevent and inadmissible. Roddy v. State (1970), ___Ind.___, 257 NE2d 816; Woods v. State (1968), 250 Ind. 132, 235 NE2d 479; Blue v. State (1968), 250 Ind. 249, 235 NE2d 471. The basis of such rule is that it is not competent to prove one crime by proving another. See U.S. v. Fierson (1969), 419 F2d 1020. Evidence that the defendant committed other crimes cannot be admitted for the purpose of proving that the defendant has a disposition to commit the crime charged. Zimmerman v. State (1921), 190 Ind. 537, 130 NE 235, the court has also

ruled that evidence cannot be introduced if it tends to create prejudice against defendant. Underhill v. State (1916), 185 Ind. 587, 114 NE 88.

The general exclusionary rule has been employed by the Courts for rape. In Meeks v. State (1968), 249 Ind. 659, 234 NE2d 629, the court reversed a rape conviction. The Court said the general rule of evidence applicable to criminal trial is that the state cannot prove against a defendant any crime not alleged in the indictment, whether as a foundation for a separate punishment, or as aiding the proof that he is guilty of the crime charged. The fact that one woman was raped has no tendency to prove that another woman did not consent. Consequently, the convictions in this case must all be reversed since the court violated the rule that one crime is not competent to prove another by admitting the testimony of Melinda Stanbaugh.

The appellant is aware that there are certain exceptions to this rule in which evidence which shows or tends to show that the defendant committed another crime wholly separate and distinct from the offense for which he is on trial is inadmissible. However, it is the appellant's contention that the circumstances in appellant's case do not come under the exception which allows evidence which tends to show motive, intention, identification, guilty knowledge, a common scheme or plan or depraved sexual instinct. In addition, it would

be the contention of the appellant that these exceptions to the general rule did not apply in defendant's case and further that the introduction of such evidence is in violation of the Constitution of the State of Indiana and numerous sections of the United States Constitution. The Fifth Amendment of the Constitution of the United States reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added)

The Sixth Amendment to the Constitution reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (Emphasis added)

The Fourteenth Amendment to the Constitution reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *(Emphasis added)*

Article One, Section Thirteen, of the Constitution of the State of Indiana reads as follows:

> In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury; in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. (Emphasis added)

The Fifth and Fourteenth Amendments to the Constitution of the United States state that no one shall be deprived of life or liberty without due process of law. Certainly by admitting testimony of other offenses for which he is not charged to convict the defendant on a principal charge is a denial of due process. Further, it is the denial of his Sixth Amendment right to be advised of the charges against him, which was incorporated into the Constitution of the state of Indiana in Article One, Section Thirteen.

In Lawrence v. State (1972), ___Ind.___, 286 NE2d 830, the defendant was charged with safe burglary and being a habitual

criminal. The jury was allowed to hear evidence of defendant's prior convictions before they had made a determination of his guilt or innocence on the safe burglary charge. The Supreme Court of Indiana stated in that case that:

> "it is difficult to see how the appellant could have received a fair trial in the safe burglary charge once the jury became aware of his prior convictions. The unfairness inherent in this procedure becomes even more obvious when it is seen that a conviction on the principal charge, which may be influenced by evidence of prior convictions, is necessary to obtain a conviction on the habitual criminal charge. Therefore, in a close case, a conviction on the principal charge might actually be obtained by the introduction of the evidence of prior convictions, which in turn would become the third felony needed to convict on the habitual criminal charge. In such an instance a conviction on either charge would be dependant on the other. The conviction on the principal charge would be dependant upon the evidence of prior convictions which could only be introduced to support the habitual criminal charge. On the other hand the habitual charge would fail, absent a finding of guilty on the principal charge. Such a circuitous effect is patently unfair and circumvents the appellant's right to a fair trial."

In Spencer v. Texas (1967), 385 U.S. 554, 87 S.Ct. 648, the question was whether the Texas habitual offender act violated the Fourteenth Amendment. The court in that case said that "the mental manipulation required by the present procedure would be difficult for one specially trained in the rules of evidence, and we would be less than realistic to expect evidence of prior conviction not to influence the juror's determination of guilt or innocence on the principal offense."

To allow testimony of prior convictions in a habitual offender trial to come in before the principal charge is proved, is as unjust and unconstitutional as to allow prior alleged sexual offenses to come in to prove the defendant guilty of the charge or charges for which he is facing. Since the Court ruled that the defendant cannot receive a fair trial when prior convictions are introduced before the principal charge is proved, it seems only consistent that a similar rule should be invoked in excluding admission of prior sexual offenses to prove the principal charges. In addition, it should be pointed out that in Lawrence, supra, the court ruled that prior convictions could not come in and in this case we do not even have convictions, thus, to allow the offenses to come in is not only violating his constitutional right to be advised of the charges against him, but violates his right to a presumption of innocence until guilt is proven beyond a reasonable doubt.

In Burgett v. State of Texas (1967), 389 U.S. 111, 88 S. Ct. 258, the court ruled that where certified records of Tennessee convictions did not show defendant was represented by counsel, the records raised a presumption that defendant was denied his right to counsel in violation of the Sixth Amendment, and therefore, Tennessee convictions should have been deemed void in subsequent prosecution in Texas, and it was error to read to jury indictment alleging Tennessee's

convictions. Thus, to admit evidence of other prior alleged sexual offenses by the defendant without showing defendant was represented by counsel in relation to those offenses would make evidence relative to those offenses inadmissible.

It is a general rule that the state may not inquire into specific acts of misconduct other than prior convictions. It has been held to be reversible error when the state is allowed to cross-examine on specific acts of misconduct other than convictions. Thus, it would seem consistent to keep out specific acts of alleged misconduct to protect the defendant's rights to fair trial in all phases of a trial and not just restrict it to cross-examination. See Hensley v. State (1971), ___Ind.___, 268 NE2d 90.

II. THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO STRIKE THE ENTIRE TESTIMONY OF SUZANNE LITTLE FROM THE RECORD BECAUSE IT HAD NO BEARING OR MATERIALITY TO THE CHARGE THE DEFENDANT WAS FACING.

The State of Indiana introduced testimony from Suzanne Little who testified that on November 8, 1972, she was approached by an individual who asked her if she knew a certain person. Miss Little testified that the individual who asked her this question was the defendant. The defendant appellant objected to any testimony from Miss Little since the defendant was not accused of committing any acts against Miss Little, and for the reason that the testimony had nothing to do with the charges facing the defendant. (TR 570 and 899). This testimony should not have been admitted

CERTIFICATION

1173 S 225

Robert Wayne Austin

vs.

State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original Brief of Appellant, pages 1, 10-16 as contained in the Brief of Appellant filed on March 15, 1974, as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 23rd day of April, 1975.

Billie R. McCullough

BILLIE R. McCULLOUGH, CLERK
INDIANA SUPREME COURT

LIBRARY
SUPREME COURT, U. S.

FILED
MAY 19 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974
No. 74-1348

ROBERT WAYNE AUSTIN,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974
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ROBERT WAYNE AUSTIN,
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STATE OF INDIANA,
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IN THE
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October Term 1974
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ROBERT WAYNE AUSTIN,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported in Austin v. State, (1974) __Ind.__, 319 N.E.2d 130, and is correctly reproduced in Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Defendant (Petitioner) was denied due process of law by the admission of evidence of other similar alleged criminal offenses at his trial.

(The Respondent deems additional language set out by Petitioner under this heading as comprehended in the above statement and as surplusage.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Articles of Amendment V and XIV)

and the Indiana Statutes (IC 35-1-55-1, 35-14-4-3, and 35-1-89-1) are correctly set forth on pages 3-5 of the Petition, except that the Respondent deems the Sixth Amendment of the Constitution of the United States not involved in this case and the Indiana statutes are pertinent only to show the nature of the crime with which Defendant (Petitioner) was charged and neither their validity nor their interpretation has been questioned herein by Petitioner.

STATEMENT OF THE CASE

1. Statement of the Facts.

Melinda Sue Stanbaugh was a student at Indiana State University in Terre

Haute, Indiana. On November 7, 1972, at about eight p.m., she went to Jones Hall, a dormitory on the campus to study with some girl friends. About one o'clock a.m., on November 9, 1972, she left Jones Hall to return to her own dormitory, Burford Hall. When she reached a point in front of Erickson Hall, Defendant drove up in a car, stopped in the middle of the street, got out, and came over to her. He seized her by the arm and said he wanted to talk to her, she replied that she did not want to talk to him and that she was on her way home (Tr.pp.679-686).

Defendant then put his arm around her neck, pulled her over to his car,

and put her in it. He drove to State Road 63, out Road 63 toward Clinton until he came to a gravel road, and to the right on the gravel road until it came to a dead end. There he stopped and attempted to kiss Miss Stanbaugh, but she turned her head and prevented him. He told her she had a pretty face and a nice body and he would hate to mess them up. He then began choking her and, at the same time, removing her clothing. After he had completely disrobed her, he removed his own clothing (Tr.pp.686-716).

He then attempted to suck one of her breasts, but she pushed him away. He then dropped to the floor of the

car and began to commit cunnilingus on her. She tried to push him away and kicked him and he became angry and bit her leg. After about ten minutes of attempted cunnilingus, he slid her down on the seat of the car and attempted to have sexual relations with her, but was unable to do so because he was unable to obtain an erection. He then forced her to commit fellatio and, when he obtained an erection by this method, he again laid her down and raped her. During the fellatio, he inserted his fingers in both her rectum and her vagina (Tr.pp.716-720).

During all these activities, Miss Stanbaugh was crying. Defendant

finally permitted her to dress and drove her back to the campus, letting her out at her dormitory, and told her he might call her Thursday night. This was about four o'clock in the morning. Inside the dormitory, Miss Stanbaugh called the security police, who took her to the infirmary (Tr.pp.720-723).

About nine-fifteen that evening, Suzanna Little, another student of the University left the Home Economics Building and started across the campus. Defendant accosted her and asked her if she "knew where George lived." She became frightened and ran (Tr.pp.560-562).

Between nine-thirty and ten o'clock,

Defendant accosted Bonnie Dianne May on the campus, saying he wanted to talk to her, and forced her into his car. He drove out toward Clinton until he came to a gravel road and then down this side road. He stopped the car, forced her to commit fellatio and then raped her (Tr.pp.616-618).

2. Legal Proceedings.

Defendant was charged with sodomy, rape, and kidnapping of Bonnie Dianne May in the Vigo Circuit Court. On trial, he was found guilty of all three counts and sentenced to imprisonment for two to fourteen years for sodomy, two to twenty-one years for rape, and life for kidnapping. His conviction

was appealed by him to the Supreme Court of Indiana and by that Court affirmed.

Miss Stanbaugh and Miss Little both testified to their adventures with Defendant, to which testimony Defendant objected and moved to have stricken because he was only charged with offenses against Bonnie Diane May and not against Belinda Sue Stanbaugh and Suzanne Little and for the reason that the testimony of Miss Stanbaugh concerned events of November 7, 1972, and he was charged with an offense committed on November 8, 1972 (although Miss Stanbaugh's contact with Defendant did not occur until one o'clock in

the morning of November 8, 1972.

James Michaels, a police officer, testified that Defendant told him that his satisfaction from forcible rape had begun four or five years before when he forced a girl with whom he was living to have sexual relations with him, when he could have had such relations with her amicably without the use of force (Tr.p.893). Defendant objected and moved to strike such testimony on the ground that it was too remote in time to be material to the case.

SUMMARY OF THE ARGUMENT

Defendant was not denied due process of law by the admission of evidence

of other similar alleged offenses at his trial because:

1. Defendant's accosting of Miss Little and rape of Miss Stanbaugh occurred in the same general location and so close in time to the crimes of which he was charged as to be part of a general campaign of sexual violence and part of the res gestae.

2. Evidence of other sexual crimes by the accused is admissible in a prosecution for rape.

3. Evidence of the rape of Miss Stanbaugh and the accosting of Miss Little proved Defendant was in the area where the attack on the prosecutrix occurred on the day it occurred.

4. James Michael's testimony of Defendant's account of his forcible sexual relations with a mistress four or five years before and his statement that that was when his fondness for forcible rape began was admissible as evidence of Defendant's proclivity for rape.

ARGUMENT

DEFENDANT WAS NOT DENIED DUE PROCESS OF LAW BY THE ADMISSION OF EVIDENCE OF OTHER SIMILAR ALLEGED OFFENSES AT HIS TRIAL.

Although Defendant speaks of denial of "due process and fair trial" in his first proposition and has a second proposition questioning the "exercise of judicial discretion," all his con-

tentions can be comprehended in the term "denial of due process of law" and will be so treated herein.

Defendant begins his argument by urging "the basic standard enunciated by the court in Lovely v. United States, 169 Fed.2d 386 (4th circ. 1948) that a person on trial for a sexual offense should be afforded the same evidentiary safeguards against irrelevant prejudicial testimony as an individual on trial for any other felony." In that case the defendant was convicted of taking a woman to a secluded spot on a military reservation and raping her and error was charged in the admission of evidence

that fifteen days prior to this alleged rape, defendant had taken another woman to a secluded spot on the reservation and raped her. The Court said in part:

> "We think there can be no question but that the admission of this testimony was reversible error. There was no issue of identity in the case, nor of knowledge, motive or intent, and the crime was not of the sort, like a stock swindling scheme or murder for insurance, where the commission of other crimes may tend to establish a plan from which the crime charged can be said to have resulted. The accused had admitted that he had had prosecutrix out in his car on the occasion in question and she had testified that he had ravished her at that time. There was no suggestion that any one else had ravished her; and upon his statement to the F.B.I., the only question was whether he had had carnal knowledge of her forcibly and against her will. The fact,

if it was a fact, that he had ravished another woman some weeks before threw no light upon that question. * * *

"It is true, of course, that evidence which has a reasonable tendency to establish the crime charged in the indictment is not rendered inadmissible merely because it establishes another crime; and the question which arises with respect to this sort of evidence is whether or not it has such tendency. In ordinary cases it is perfectly clear that evidence of other crimes committed by the accused has no such tendency, and is properly excluded as irrelevant. Evidence of the commission of similar offenses closely related in time and place may, however, be relevant on such matters as identity, guilty knowledge, motive or intent, where these are in issue, or may tend to establish a criminal plan or design out of which the crime charged has originated. * * *"

It is clear that the decision in Lovely rests solely on the fact

that the defendant admitted sexual relations with the prosecutrix, contending only that it was with her consent, thereby removing the issues of identity and intent from the case and that the decision would have been different had defendant, as in this case, denied that he was the man who committed the rape. Such a rule is fraught with potential injustice. A defendant whose conviction is certain and against whom evidence of other similar crimes has been introduced to show his identity or intent has only to take the stand and admit sexual relations with the prosecutrix at the time and place charged to be assured

that his conviction will be reversed.

However, Lovely is not applicable to this case. Defendant did not admit sexual relations with the prosecutrix and his identity was very much an issue. The rape of Miss Stanbaugh took place on the same calendar day as that of Miss May, in an identical manner and at substantially, if not exactly, the same place. The accosting of Miss Little took place on the same college campus only a half hour before the kidnapping and subsequent rape of Miss May. Both of these incidents come within the exception set out in Lovely of "similar offenses closely related in time and place."

In United States v. Windsor, (1969) 417 Fed.2d 1131, Lovely was cited by the Court as authority for the statement:

> "However, it is the long-settled rule that evidence of criminal conduct not alleged in the indictment may be adduced when it is closely related in time and place and tends to establish a plan or design out of which the crime charged originated."

In United States v. Smith, (1971) 446 Fed.2d 200, on the authority of Lovely, the Courts said:

> "While evidence of the commission of another offense is not admissible to show criminal propensities in the person on trial, such evidence is admissible where it tends to establish a common scheme, plan, system, or design, or where it is so related to the crime charged that it serves to establish motive, knowledge, intent, or the

absence of mistake or accident."

In both the Stanbaugh rape and the May rape, Defendant forced the victim into his car, after stopping her on the pretense that he wished to talk to her. In both instances, he drove out of town toward Clinton to a gravel road and stopped on this gravel road. In both instances, he forced the victim to prepare him for the rape by fellatio.

The statement by Defendant to police of his forcible sexual relations with his mistress four or five years before followed his confession of the rape with which he was charged and was given by him to the police as an

explanation for his preferance for sexual relations obtained by force. It establishes that the rape of Miss May, that of Miss Stanbaugh, and his accosting of Miss Little, all on November 8, 1972, were all part of a habitual life pattern deliberately and willfully established by him by the first sexual attack on his mistress four or five years before.

In Brent v. White, (D.C.La., 1967), 276 Fed.Supp.386, Aff. 398 Fed. 2d 503, cert. den. 393 U.S. 1123, 89 S.Ct. 998, 22 L.Ed.2d 130, the prosecution in a rape case was permitted to introduce evidence of a prior conviction of the defendant of a

similar offense against another victim, which admission of evidence was approved both by the Louisiana Supreme Court and by the Federal Courts on a petition for a writ of habeas corpus. The District Court said:

> "The purpose of the testimony concerning the prior conviction was to show that the approach used by the petitioner on a prior occasion, involving a different victim, was a similar approach to that alleged by the complaining witness to have been used in this case.
>
> "Whether or not the introduction of this evidence violated the law of the State of Louisiana is of no moment in this habeas corpus proceeding. The only question is whether or not it violated any federally protected rights. This question must be answered in the negative."

Impact is added to the Brent case

by the fact that it involved the rape of a white girl by a Negro and evidence was presented that in his previous conviction the victim was a white girl. There was no racial aspect to this case.

In State v. Crook, (1969) 253 La. 961, 221 So.2d 473, the defendant forced a young woman at gun point, as she was walking home from a bus line, to enter his car, drove her to another part of town, raped her, and then returned her to the same area where he had picked her up. The Louisiana Supreme Court held there was no error in permitting the State to introduce evidence that he had raped

another woman in exactly the same manner five nights previous. The United States District Court for the Eastern District of Louisiana in Crook v. Henderson, (1970) 310 Fed.Supp.200, denied a writ of habeas corpus, holding that the admission of such evidence did not deny the defendant any federal right.

In both Brent and Crook, the defendant had been sentenced to death, but the federal court held that his federal rights had not been violated by the admission of evidence of previous rapes, and in Brent, the Supreme Court of the United States denied an application for a writ of certiorari.

In Spencer v. State of Texas, (1967) 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606, a similar question was involved where three defendants alleged to be habitual criminals complained because evidence of their prior convictions was introduced in their trials on the current charges. Their convictions, which resulted in one being sentenced to death and other other two to life imprisonment, were affirmed by this Court.

The following excerpt from the Court's opinion summarizes the Court's view of the constitutionality of admission of evidence of other offenses in the trial for the current offense:

"* * * The rules concerning evidence of prior offenses are complex, and vary from jurisdiction to jurisdiction, but they can be summarized broadly. Because such evidence is generally recognized to have potentiality for prejudice, it is generally excluded except when it is particularly probative in showing such things as intent. * * * an element in the crime, * * * identity, * * * malice, * * * motive, a system of criminal activity, * * * or when the defendant has raised the issue of his character, * * * or when the defendant has testified and the State seeks to impeach his credibility * * *

* * *

"This general survey sufficiently indicates that the law of evidence, which has been chiefly developed by the States, has evolved a set of rules designed to reconcile the possibility that this type of information will have some prejudical effects with the admitted usefulness it has as a factor to be considered by the jury for any one of a large number of valid purposes. * * *

* * *

"Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. * * * But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and wide-spread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' * * *"

In the light of the opinion in Spencer, a consideration of the state rulings on the question is pertinent. In State v. Robbins, (1943) 221 Ind. 145, 46 N.E.2d 691, the Supreme Court of Indiana held that, where the chief element of an offense is illicit sexual relations, evidence of prior and subsequent sexual offenses by the defendant are admissible, subject to broad discretion of the trial court to exclude them for remoteness. In Meeks v. State, (1968) 249 Ind. 659, 234 N.E.2d 629, the same Court declined to follow Robbins and followed the decision in Lovely v. United States, supra. The prevailing rule in Indiana

is set forth in Miller v. State, (1971) 256 Ind. 299, 268 N.E.2d 299. In that case the Supreme Court of Indiana upheld the admission of evidence of another act of forcible sodomy by the defendant, who was charged with kidnapping, rape, sodomy, and automobile banditry. It distinguished that case from Meeks by pointing out that in Meeks the defendant admitted the act of intercourse but claimed it was with the victim's consent. The court quoted the following from Lamar v. State, (1964) 255 Ind. 104, 109, 195 N.E.2d 98, 101:

> "As an exception to the general rule, it is always permissible for the state, in actions involving

abnormal sexual intercourse, to introduce evidence as to other improper acts of sexual intimacy committed by the defendant.* * *

"In effect, then, evidence regarding other similar sex offenses is admitted as tending to support the credibility of the prosecuting witness as his testimony is related to the particular offense charged.* * *"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1348

ROBERT WAYNE AUSTIN,
Petitioner,

v.

STATE OF INDIANA
Respondent.

APPENDIX A
OPINION OF INDIANA SUPREME COURT

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APPENDIX A
OPINION OF INDIANA SUPREME COURT

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IN THE
SUPREME COURT OF INDIANA

ROBERT WAYNE AUSTIN,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 1173 S 225
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable C. Joseph Anderson, Judge

PRENTICE, J.

Defendant (Appellant) was charged with the crimes of Sodomy, Rape and Kidnapping, all arising out of the abduction and abuses of the prosecuting witness by the defendant on November 8, 1972. He was found guilty on all counts and sentenced to imprisonment upon such charges respectively for terms of two (2) to fourteen (14) years, two (2) to twenty-one (21) years and life. His appeal presents four issues:

I. The admissibility of evidence of prior sexual offenses of the defendant.

II. The admissibility of testimony that the defendant had approached another woman shortly prior to the abduction of the prosecuting witness.

III. The admissibility of extra-judicial statements of the defendant made to a police officer during his incarceration and admitting a prior sexual assault.

IV. The denial of the defendant's motion for mistrial following a reference to a polygraph test by one of the State's witnesses.

• • •

The prosecuting witness was a college student. She lived on campus. In the early night hours, she left her dormitory to go to another building on campus. While crossing a public street, she was approached by the defendant who said he wanted to talk to her. He forced her into his automobile and drove to a secluded spot and there forced her to submit to sexual intercourse, fellatio and cunnilingus. The sufficiency of the evidence is not in issue.

ISSUE I. A State's witness, another woman student at the college, testified that in the early morning hours of the same day as the abduction of the prosecuting witness, the defendant forced her to submit to sexual intercourse and oral sex. Defendant objected to this testimony and moved to have it stricken, which objection and motion were overruled.

The general rule in Indiana for the admission of evidence of separate, independent and distinct crimes in establishing the guilt of a defendant is that such evidence is inadmissible except where relevant to show: (1) intent, (2) motive, (3) purpose, (4) identification, (5) common scheme or plan. *Watts* v. *State* (1950), 229 Ind. 80, 95 N.E. 2d 570, and cases there cited.

It has been held, however, that the above rule does not apply where the chief element of the offense is illicit intercourse between the sexes, and that such evidence of prior and subsequent acts is admissible subject to exclusion in the discretion of the trial court for remoteness. *State v. Robbins* (1943), 221 Ind. 125, 46 N.E. 2d 691.

The Robbins' decision was not followed in *Meeks* v. *State* (1968), 249 Ind 659, 234 N.E. 2d 629 and Judge Lewis writing for a unanimous Court and relying principally upon *Lovely v. United States* (1948), Cir Ct. of Appeals 4th Cir., 169 F. 2d 386, determined that an individual on trial for a sexual offense should be afforded the same evidentiary safeguards against irrelevant prejudicial testimony as an individual on trial for any other felony. This Court subsequently declined to follow the Meeks decision in *Miller v. State* (1971), 256 Ind. 296, 268 N.E. 2d 299, wherein the court on a charge of rape by force, permitted a witness to testify that the defendant had raped her by force thirty-five days prior to the act charged. This Court distinguished Meeks as having been involved only with the issue of consent. Sodomy was not an issue. The writer of this opinion dissented therein and would, in the case at bar, exclude the evidence, but the majority has voted to follow the Miller decision.

ISSUE II. Another woman student at the college testified, over the defendant's objection, that she was approached by the defendant, approximately one-half hour prior to the time the prosecuting witness was abducted and in the same general area, and that the defendant on that occasion asked her if she knew where George lived. Although the defendant was not charged with any offense against this witness, her testimony was relevant in that it placed the defendant in the area at the approximate time the abduction occurred. Any fact which tends legitimately to connect the accused with the commission of the crime is admissible. *Elliott* v. *State* (1972),—— Ind. ——, 279 N.E. 2d 207, 209; *Pullins v. State* (1970), 253 Ind. 644, 647, 256 N.E. 2d 553; *Thomas v. State* (1968), 251 Ind. 76, 80, 238 N.E. 2d 20; *Forman* v. *State* (1938), 214

Ind. 79, 84, 14 N.E. 2d 546. See also, 29 Am. Jur. 2d, Evidence § 251; 22A C.J.S., Criminal Law §§ 606 and 610.

ISSUE III. Over the defendant's objection that it related to an event too remote to the issue, a police officer was permitted to testify that while the defendant was in his custody, the defendant voluntarily related to him that five years earlier he yielded to an urge to force sexual intercourse upon the woman with whom he was living and who would have readily consented. He related that he thought that this was when the urge to force intercourse first started with him. The evidence was relevant as reflective of the defendant's criminal intent. In this regard, we think the remoteness of the first instance of forcible intercourse was immaterial, because the admission of the defendant clearly indicated that the urge for forcible intercourse continued to the present time. Upon a specific objection for "remoteness," however, the trial judge has wide discretion; and the degree of remoteness goes to the weight and not to the admissibility of the evidence. *Garr v. State* (1967), 248 Ind. 295, 227 N.E. 2d 171, *Watts v. State* (1950), 229 Ind. 80, 104, 95 N.E. 2d 750; *Booher* v. *State* (1926), 198 Ind. 315, 321, 153 N.E. 497.

ISSUE IV. During the direct examination of Police Officer Tryon by the prosecutor, the witness' attention was directed to November 11th and he was asked:

> "And would you tell the jury where you went with the defendant and who went with you?"

The witness replied:

> "At seven o'clock A.M., November 11, 1972, the chief of Detectives, Frank Hoffman, Detective Michaels, and myself, and Indiana State University Officer, Chris Lester accompanied Robert Wayne Austin to

Putnamville, Indiana, the location of the Indiana State Police Post, where a polygraph . . . ."

At the mention of the word "polygraph," defense counsel moved for a mistrial. The motion was denied, but the jury was instructed to disregard the witness' last statement and to give it no consideration when considering the rest of his testimony. Interrogation concerning November the 11th was not resumed.

It is the defendant's contention that the mere mention of the word "polygraph" was so prejudicial as to constitute an "evidentiary harpoon," speculating that the jury would thereby conclude that the defendant had undergone and failed a polygraph examination upon the issue of the crime charged.

The granting of a motion for mistrial rests largely in the discretion of the trial judge. *Bonds* v. *State* (1972), —— Ind. ——, 280 N.E. 2d 313; *White v. State* (1971), 257 Ind. 64, 272 N.E. 2d 312.

If the defendant underwent a polygraph test, such fact should not have been disclosed to the jury—directly or indirectly, but we do not draw the harmful conclusion that the defendant does. The mention of the word "polygraph" was probably erroneous—but harmless. Certainly it did not rise to the level compelling a mistrial within the guidelines set forth in *White v. State* (supra). "Voluntary testimony of witnesses frequently cannot be controlled by counsel during questioning. However, even if the testimony of the witness was prejudicial to the appellant the action of the court in admonishing the jury to disregard the testimony, ordering it stricken from the record and ordering the jury not to consider the same, cured the defect." *McPhearson* v. *State* (1966), 247 Ind. 579, 583, 219 N.E. 2d 907.

We find no reversible error, and the judgment of the trial court is affirmed.

ARTERBURN, C.J. and GIVAN and HUNTER, JJ. concur.

DeBRULER, J. concurs in result.

CERTIFICATION

1173 s 225

Robert Wayne Austin

Vs.

State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original Indiana Supreme Court Opinion, filed November 27, 1974, as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 12th day o February, 1975.

BILLIE R. McCULLOUGH, Clerk
INDIANA SUPREME COURT